CHAPTER 10.

OF THE POWER OF THE CORPORATION TO HOLD REAL ESTATE, AND OF THE ACQUISITION THEREOF.

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§ 117. *Power of corporation to receive and purchase land.*—Every corporation formed under this act [*General Railroad Act, Laws* 1850, *chap.* 140], shall have power:

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.

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 an act entitled "An act authorizing the construction of railroads upon Indian lands," passed May 12, 1836. (*Laws* 1850, *chap.* 140, § 28, *subds.* 2, 3, *as amended and re-enacted by Laws* 1880, *chap.* 133, § 2, *sub.* 3.)

(See §§ 155 and 156, *post.* See section 199, *post, i. e.*, section 28, subd. 4, chap. 140, Laws 1850, as re-enacted by chapter 133, Laws of 1880, authorizing the taking of land by the company to lay out and construct its road and for the necessary cuttings and embankments.)

The company can acquire no title without the consent of the owner of the fee or the appraisal and payment of the damages. (*Supreme Ct.*, 1863, *Craig* v. *Rochester City and Brighton R. R. Co.*, 39 Barb., 491; see *Gilbert* v. *Columbia Turnpike Co.*, 3 John., 107.) Plaintiff conveyed in fee to a railroad company a piece of his land for the road, upon condition that the road should be completed over it by a certain day. It was not then completed, but after the day plaintiff gave them notice to make the fences and permitted them to make expenditures on the land, and did not assert the forfeiture until two years afterward and then brought ejectment. *Held*, that the forfeiture had been waived. (*Supreme Ct.*, 1852, *Ludlow* v. *N. Y. and Harlem R. R. Co.*, 12 Barb., 440.) A railroad company, on purchasing land, has the right to pay a part of the consideration therefor by keeping open portions of the same as public streets. A condition in the deed that certain portions of the land conveyed shall be kept open as public streets is not void as imposing a duty or trust upon the corporation inconsistent with its business and outside of the objects for which it was formed. (*Supreme Ct.*, 1866, *Tinkham* v. *Erie Railway Co.*, 53 Barb., 393.)

The conveyance of title should be by deed. In the case of *Miller* v. *Auburn*

and Syracuse R. R. Co. (6 Hill, 61), the court decided that the owner of lands cannot grant the right to enter upon and occupy them by a railroad, for an indefinite length of time, without a conveyance sufficient under the statute of frauds to convey a freehold The right of permanently occupying one's own land, in such a manner as to deprive the adjoining owner of an easement, cannot be acquired under a parol license; such license being revokable, even after it is executed. (Per Cowen, J.) The license, hence, is a justification for acts done under it, while unrevoked, and if the company go and do work under parol leave from the owner they will not be liable to an action As to revocation of license, see 15 Wend., 380; 3 Kent's Com., 451, 4th edition. The grantor cannot recover damages by reason of the land being used for railroad purposes, where he had voluntarily conveyed the premises without restriction. (*Matter of the Utica, etc., R. Co.*, 56 Barb., 456; see *Root* v. *N. Y. and Erie R. Co.*, 18 Barb., 80; *Hentz* v. *Long Island R. Co.*, 13 Barb., 646.)

A grant to a railroad corporation of so much of a farm as might be necessary for the construction of the road if it should cross the farm, provided it should not cross south of a certain line—*Held* inoperative if the road crossed the farm south of such line. (*V. Chan. Ct.*, 1840, *Douglass* v. *N. Y. and Erie R R. Co.*, Clarke, 174.) The title to certain real estate, purchased with the corporate funds, but without the knowledge of the company, the deed being taken in the name of a director, will nevertheless vest at once in the company. (*Buffalo, etc., R. Co.* v. *Lampson*, 47 Barb., 533.) Though a corporation is chartered for a limited number of years, a grant to them and their successors is a grant in fee. The power to purchase lands was a power incident at common law to all corporations, unless they were specially restrained by their charters or by statute (2 Kent, 281; Co. Lit., 44, a, 300, b; 1 Kyd on Corp., 76, 78, 108, 115; 3 Pick., 239), and is expressly conferred (1 R. S., 731) for the purposes of the corporation. Moreover, by 1 R. S., 748, section 1, every grant passes all the estate or interest of the grantor, unless the intent to pass a less estate or interest appears by express terms or is necessarily implied. There is no necessary connection between the period of enjoyment and the quantity of the estate. (*Ct. of Appeals*, 1854, *Nicoll* v. *N. Y. and Erie R. R. Co.*, 12 N. Y. [2 Kern.], 121; affirming S C., 12 Barb., 460; to similar effect [citing also Prest. on Est., 250] is *People* v. *Mauran* [*Supreme Ct.*, 1848], 5 Den., 389.)

By the general railroad law of 1848 (page 228, § 20), it was provided that in case the company could not agree with the owner of the land through which they proposed to lay their road, the company might apply to the Legislature, who might "determine and decide that such proposed route will be of sufficient public utility to justify the taking of private property for the construction of the same."

By the present law, there is no restriction but the power given to the Supreme Court to change the location; and now a company formed under this law may take any lands on making the compensation provided for, subject only to this restriction. Under the above subdivision three of section twenty-seven it seems the railroad company is restricted to no limits except their necessities in the acquisition of lands for stations, etc.; and it would be a question for the jury whether such real estate was *bona fide* purchased for the purposes contemplated in its charter. (See *Moss* v. *Averell*, 10 N. Y., 462; see sections 155 and 156, *post*, for proceedings to acquire additional real estate, rights to convey water, etc.)

Passenger depots, convenient and proper places for the storing of cars and locomotives; proper, secure and convenient places for the receipt and delivery of freight, and for the safe and secure keeping of property between the time of its receipt and dispatch, or after its arrival and discharge and before delivery, are among the acknowledged necessities for running and operating a railroad, and the right to take lands for these purposes is included in the grant of power given by the general railroad act, as amended in 1869 (Laws of 1869, chap. 237, sec. 1), which authorizes railroad corporations to acquire real estate "for the purposes of its incorporation or for the purpose of running or operating its road." (*Matter of N. Y. and Harlem R. R. Co.* v. *Kip*, 46 N. Y., 456. For the act of 1869, above referred to as amended, see section 156, *post.*)

In the city of New York depots for freight, cattle and live stock are within the purposes for which railroads are constructed, and the lands necessary therefor may be taken by proceedings *in invitum.* (*Matter of N. Y. C. and H. R. R. R. Co* v. *Gas-light Co.*, 5 Hun, 201.) A railroad company may acquire land, under the statute, for the purpose of approaching structures erected by it for purposes for which the necessary land might have been taken. (*Id.*) To authorize the company to take lands, a reasonable necessity therefor must be shown. It is not, however, a question of possibility, but of strict practicability. (*Id.*) Under the statutes authorizing railroad companies to acquire title to real estate without the owners consent, a company cannot take lands simply for the purpose of removing gravel therefrom, to be used in constructing a distant portion of its road. (*N. Y. and Canada R. R. Co.* v. *Gunnison*, 1 Hun, 496.) For the general principles applicable to the taking of land by railroad corporations, see *Rens. and Sar. R. R. Co.* v. *Davis*, 43 N. Y., 137, in which case, it is said, it is for the court to decide as to the extent and necessity of such appropriation, and the determination of the board of directors of the company is not conclusive upon such question. (See, also, *Matter of Boston and Albany R. R. Co.*, 53 N. Y , 574.) The width of the road is limited to six rods, but, in case of cuttings and embankments, the company may take as much more land as may be necessary to a proper construction of the road. (*Laws* 1850, *chap.* 140, § 28, *subd.* 4; see § 199, *post.*) That the real estate of a corporation can be conveyed only by the proper officers, and not by the stockholders. (*Wilde* v. *Jenkins*, 4 Paige, 481.) A railroad corporation, under the power delegated to it by the general railroad act, to acquire title to lands for the purposes of its incorporation, has, to a large extent, the right to determine the measure of its wants, and to fix upon the location of land to be appropriated, subject to the qualification that the purposes for which the land is to be taken are strictly within its charter. (*In re N. Y. C. R. R. Co., etc.*, 62 N. Y., 326.) Where a reasonable necessity is shown, the courts will not interfere with the exercise of its discretion in selecting suitable lands, unless the selection will result in great injury, or was influenced by some improper motive. (*Id.*) Depots and cattle yards for freight and live stock—*held*, essential in New York city. (*Id.*)

The only limit granted to the power to railroad corporations to take land for railroad purposes, is the reasonable necessity of the corporation in the discharge of its duty to the public. (*In re N. Y. C. R. R. Co.*, 77 N. Y., 248.) This includes the acquisition of land for depots and buildings convenient and proper for storage of cars and locomotives when not in use, the receipt, storage, safe-keeping and delivery of freight and property, as well as such facilities as are

usually required in operating its road and the successful prosecution of its business. (*Id.*) The prospective needs of the corporation, for a reasonable time, may be taken into consideration. (*Id.*) The fact that such exercise will be attended with extreme inconvenience and hardship to individuals, is not entitled to any weight, and when a clear right to the exercise of the former is shown, it is the duty of the court to authorize it. (*Id.*) Where a railroad corporation is authorized to appropriate lands only for its own use for the purposes contemplated by its charter, it is not lawful to add to such use that for street or highway purposes unless additional compensation is made to the owner of the fee. (*Strong* v. *City of Brooklyn*, 68 N. Y., 1.)

Lands lying under water in the Hudson river, with or without a water front, required by a railroad corporation for piers and wharves to facilitate the transportation of freight, may be condemned by proceedings for that purpose. (*In re N. Y. C. R.R. Co.*, 77 N. Y., 248.) As to whether the railroad company can acquire an exclusive right to the piers, *quaere*. (*Idem.*)

§ **118.** *Power of corporation to acquire title in fee.*—Any railroad corporation in this State may acquire the title in fee, by the special proceedings herein before mentioned [refers to Laws of 1850, chap. 140], to any land which it may require for roadway and for necessary buildings, depots and freight grounds. (*Laws* 1857, *chap.* 444, § 2.)

All lands acquired by any railroad company by appraisal for passenger and freight depots shall be held by such company in fee. (*Laws* 1854, *chap.* 282, § 17.)

The fact a railroad company is in possession of lands under an unexpired lease is no impediment to proceedings on its part under the general railroad act to acquire title in fee. (*Kip* v. *N. Y. C. and H. R. R. R. Co.*, 67 N. Y., 227.)

§ **119.** *Power of corporation to purchase lands in another State or hold stock of company in, for the purpose of securing fuel.*—Any railroad company organized under the laws of this State may purchase, hold and convey lands, or any interests in lands, in any other 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.)

119(*a*). *When company may hold and convey land in other States for business purposes.*—It shall be lawful for any corporation organized under the laws of this State, and transacting business in several States or foreign countries, to acquire, hold and convey in such States or countries, with the consent thereof, such real estate as shall be requisite for such corporation in the convenient transaction of its business, or to purchase, hold, own and dispose of any stock in other corporations owning such real estate situate in such

States or foreign countries, in conformity to the laws thereof; but the authority herein granted shall not be construed to authorize any corporation organized under the laws, existing or doing business in this State, to purchase, hold, own or convey any other stocks than such as may be or may have been based upon or represent real estate, the possession of which shall be required in the transaction of its legitimate and ordinary business. (*Laws* 1872, *chap.* 146, § 1, *as amended by Laws* 1875, *chap.* 119.)

§ **120.** *State lands, acquisition of title to.*—The commissioners of the land office shall have power to grant to any railroad company formed under this act, any land belonging to the people of this State, which may be required for the purposes of their road, on such terms as may be agreed on by them; or such company may acquire title thereto by appraisal, as in the case of lands owned by individuals; and if any land belonging to a county or town is required by any company for the purposes of the road, the county or town officers having the charge of such land may grant such land to such company, for such compensation as may be agreed upon. (*Laws* 1850, *chap.* 140, § 25.)

The owner of lands adjoining a navigable river in which the tide ebbs and flows, has no private property in the waters of the river, or the shore between high and low water-mark, and is not entitled to compensation from a railroad company which constructs, in pursuance of a grant from the Legislature, a railroad along the shore between high and low water-mark, so as to cut off all communication between said land and the river otherwise than across said road. (*Gould* v. *Hudson River R. R. Co.*, 6 N. Y., 523.)

§ **121.** *Title to Indian lands, how acquired.*—It shall be lawful for any railroad company that has been, or may hereafter be chartered by the Legislature of this State, to contract with the chiefs of any nation of Indians, over whose lands it may be necessary to construct such railroad, for the right to make such road upon lands; but no such contract shall vest in such railroad company the fee to such lands, nor the right to occupy the same for any purposes other than what may be necessary for the construction, occupancy and maintenance of such railroad. (*Laws* 1836, *chap.* 316, § 1.)

§ **122.** *The same.*—No contract made with the chiefs of any nation of Indians, for the purposes mentioned in the first section of this act, shall be valid or effectual, until the same shall be ratified by the court of common pleas of the county where such land may be situated. (*Idem*, § 2.)

Under section 30, subdivision 11, of the Old Code of Procedure, county courts had original jurisdiction to exercise all the powers and jurisdiction conferred upon the late courts of common pleas of the county, respecting the laying out of railroads through Indian lands. In enacting the Code of Civil Procedure this section of the former code was omitted. But see Laws 1880, chapter 245, section 3, sub. 6, which declares that the repeal effected by that act shall not affect the former jurisdiction or authority of the county court respecting the laying out or railroads through Indian lands.

§ **123.** *Salt lands, acquisition of title to.*—Whenever it shall be necessary for any railroad company to occupy any of the salt lands belonging to this State for the use of their road, the same shall be appraised in the manner provided for in the second section of this act, and when they shall pay into the treasury of this State, the said appraised value, they shall become possessed of the same to the same extent as by their charter they are are authorized to become possessed of land belonging to individuals. (*Laws* 1848, *chap.* 346, § 7.)

The taking of part of the salt lands for railroad purposes, in the manner specified in the above statute, upon appraisal and payment of damages to the State, is not a sale within the intent of the constitutional prohibition in reference to such lands. (*Parmelee* v. *Oswego, etc., R. R. Co.*, 7 Barb., 599; affirmed on other grounds, 6 N. Y., 74.)

§ **123**(*a*). *Acquisition of right of way over lands of the State in Richmond county.*—The commissioners of the land office shall have the right to grant to any railroad company formed under the laws of this State any right of way which may be required for the purposes of its road, not exceeding thirty feet in width at grade of road, with such additional width as may be required at cuttings or embankments, over or across any land in Richmond county belonging to the people of this State, including such as are owned or occupied by the commissioners of quarantine, the health officer of the port of New York, the trustees of the Seamen's fund and retreat in the city of New York, on such terms as may be agreed on by them, or such company may acquire title to such right of way by appraisal in the same manner as is provided by law for acquiring title for railroad purposes to lands owned by individuals. (*Laws* 1881, *chap.* 148.)

§ **124.** *Title to real estate, how acquired against owner's consent.*—In case any company formed under this act is unable to agree for the purchase of any real estate required for the purpose of its incorporation, it shall have the right to acquire title to the same, in the manner and by the special proceedings prescribed in this act. (*a*) *Laws* 1850, *chap.* 140, § 13.)

(*a*) Laws 1850, chap. 140.

See section 118, *ante*, allowing the title in fee of lands to be taken by the company, and see note to section 144, *post*. See also sections 125 and 156, *post*.

In an analogous proceeding to acquire title to land for purposes of a supply of water to the city of New York, and when by statute such power was authorized to be exercised when the water commissioners and land owners disagreed as to the compensation, it was said that the Legislature manifestly intended to give the owner an opportunity of a voluntary sale, and required the respondents to make a fair and honest effort to purchase the land of him before taking proceedings to take it adversely; hence the disagreement of the parties as to the amount of compensation was a material requirement of the statute and an essential prerequisite, without which the court had not jurisdiction. (*Dykman* v. *The Mayor, etc.*, 1 Seld., 439. The disagreement of the parties as to the amount of compensation is a material requirement of the statute, without which the court has not jurisdiction. (*Gilbert* v. *Columbia Turnpike Co.*, 3 John. Cas., 107.) This section aims to divest the land owner of the property in question without his consent, and the provisions of the following sections must be strictly followed in order to accomplish such end. (*Adams* v. *Saratoga, etc., R. R Co.*, 10 N. Y., 328; *Sharp* v. *Speir*, 4 Hill, 76.)

The provision of the general railroad act (sec. 13), making it a prerequisite in proceedings *in invitum* to acquire title to lands that the company shall be "unable to agree for the purchase," does not mean impossibility to purchase, at any price however large, but that the owner must be either unwilling to sell at all or at a price which in the judgment of the agents of the corporation is excessive. (*In re P. P. and C. I. R. R. Co.*, 67 N. Y., 371.) An amendment of the petition of a railroad corporation in proceedings to acquire title to lands so as to ask for a less quantity of land, made upon the hearing at special term, does not make necessary a further attempt at agreement on a price, at least when the owners are represented in court and no suggestion is made in their behalf of a withdrawal of opposition or for a suspension of proceedings with a view to such attempt. (*Idem.*)

Railroads for the conveyance of travelers and merchandise from one part of the State to another, are public improvements, and for the benefit of the public, for which private property may be taken, under authority of the Legislature, on paying a just compensation to the owners. (*Chancery*, 1831, *Beekman* v. *Saratoga and Schenectady R. R. Co.*, 3 Paige, 45; *Ct. of Errors*, 1837, *Bloodgood* v. *Mohawk and Hudson R. R. Co.*, 18 Wend., 9; *Ct. of Appeals*, 1853, *Buffalo and N. Y. City R. R. Co.* v. *Brainard*, 9 N. Y. [5 Seld.], 100: see also *People* v. *Law*, 34 Barb., 494; S. C., 22 How. Pr., 109.)

The right of eminent domain does not imply a right to take property of one citizen and transfer it to another, when the public interest will in no way be promoted by such a transfer, even if a full compensation be awarded. (11 Wend., 149; 5 Paige, 137; 19 Wend., 659; *Beekman* v. *Saratoga and S. R. R. Co.*, 3 Paige, 45; *Taylor* v. *Porter*, 4 Hill, 140.) The law is settled in this State that the Legislature may rightfully authorize the construction of railroads or other works of a public nature, without requiring compensation to be made to persons whose property has not actually been taken or appropriated for the use thereof, but who may nevertheless suffer indirect or consequential damages by the construction or by the operation of such works. (4 Comst., 195; 2 Seld., 522; 23 N. Y., 42; 27 id., 193; 23 Barb., 482; 21 id., 617; 26 id., 183; 10 id.,

26; 21 Conn., 294; *Supreme Ct.*, 1867. *Arnold* v. *Hudson R. R. R. Co.*, 49 Barb., 108; Crary's Sp. Pro., vol. 2, p. 212.)

To take private property for public use, without providing a just compensation to the party, is not only unconstitutional, as against the fundamental principles of government, but a violation of natural right and justice. A statute, therefore, which violates this principle is null and void. (*Bradshaw* v. *Rodgers*, 20 Johns., 103; id., 735.) The Legislature has power to take private property for necessary and useful public purposes; but to render the exercise of this power valid, a fair compensation must in all cases be previously made to the individuals affected, under some equitable assessment to be provided by law. (2 Johns. Ch. R., 162.) The power to take private property for public use, is inseparably connected with the sovereign power of the State, and the constitution merely regulates its exercise by requiring that a just compensation be made to the owner. This compensation, so that it be just, may be made in any form, in money, in property, or in the benefit to the owner's remaining property springing from the improvement. (17 Wend., 649.) It was decided formerly that it was not necessary that the compensation should be actually paid before the taking of the land (*Smith* v. *Helm*, 7 Barb., 416; 14 Wend., 51; 18 id., 9), but now, by section 18, the money must be paid or deposited before possession is taken. The Legislature has no power to authorize a railroad corporation to enter upon and appropriate A's land, though it be a highway, without providing a just compensation to him. (*Thatcher* v. *Auburn and Syracuse R. R. Co.*, 25 Wend., 462; *Presbyterian Society in Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill, 567.)

The act is not unconstitutional because it does not appropriate the specific land taken for public use itself, but delegates to the company the right in each particular case to make the location and selection. (*Buffalo, etc.*, v. *Brainard*, *supra*.) The franchises of a corporation may be taken for public use, upon making due compensation therefor. (*In the matter of Kerr*, 42 Barb., 119.) The constitution (article 1, section 7) provides for the taking of private property for public use, and it has been repeatedly decided that taking lands by a railroad company is for a public use. Railroads are public improvements, and an act authorizing a railroad company to take private property, upon the payment of a fair compensation, is constitutional. (*Beekman* v. *Saratoga, etc., Co.*, 3 Paige, 45. For the provisions of the statute in regard to the acquisition of title, prior to the provisions of the general railroad act of 1850, see Laws 1847, chap. 494, sec. 1. Section 157, *post*.)

A proceeding under the following sections of the railroad act, for the purpose of acquiring land by appraisement of compensation, etc., is a special proceeding (*N. Y. Cent. R. R. Co.* v. *Marvin*, 11 N. Y., 276; 10 How., 168.) Where the company is incorporated under a special act, and the manner of acquiring title to lands as provided in its charter, is inconsistent with the provisions of the general railroad act for the same purpose, the proceedings may be had under the charter, and not under the general act. (*Clarkson* v. *Hudson River R. R. Co.*, 12 N. Y., 304; *Visscher* v. *Sime*, 15 Barb., 37; *Moshier* v. *Hilton*, id., 657; *Hudson River R. R. Co.* v. *Outwater*, 3 Sandf., 689; see introductory chapter, *ante*.) The laws of 1857 (chap. 444, § 2), provide that *any* railroad company may acquire title to any land which it may require for roadway and for necessary buildings, depots and freight grounds, by the special proceedings of the general railroad act. Either mode, therefore, may be pursued. (*Moshier*

v. *Hilton, supra.*) (For the above mentioned act of 1857, see § 118, *ante.*) The power conferred by the statute being in derogation of the common law, all the requirements of the statute authorizing its exercise must be strictly pursued. (Crary's Sp. Pro., vol. II, p. 212, and cases cited.)

Lands already acquired by one railroad corporation and held for the necessary enjoyment of its essential franchises, cannot be condemned and appropriated in the usual way by another corporation. (*Lake Shore and Mich. South. R. R. Co.* v. *N. Y., Chicago and St. L. R. R. Co.*, Federal Reporter, vol. VIII, *n.* 12; U. S. Circuit Court Pa., Sept., 1881.) A railroad can only hold and acquire an amount of real estate commensurate with its necessities. (*Id.*) Whether or not this limit has been overstepped, is a proper subject of judicial investigation when the controversy before the court arises from an alleged encroachment by another corporation, but every reasonable intendment must be made in favor of the corporation that was the first to acquire title. (*Id.*) It is competent for the Legislature to authorize one company to use any portion of a railroad track owned by another company, upon making due compensation. (*Supreme Ct.*, 1864, *Matter of Kerr*, 42 Barb., 119.)

§ 125. *The same; title to roadway, how acquired.*—In case any railroad company, the line or route of whose road has been surveyed and designated, and the certificate thereof duly filed as required by law, is unable to agree for the purchase of any real estate required for its roadway, the said corporation shall have the right to acquire title to the same by the special proceedings prescribed in the act hereby amended;* and all real estate acquired by any railroad corporation, under and pursuant to the provisions of this act, for the objects and purposes herein expressed, shall be deemed to be acquired for public use. But this section shall not be so construed as to apply to any real estate in the city of Buffalo, situate between Main and Michigan streets. (*Laws* 1854, *chap.* 282, § 4.)

The above cited section 4 was amended (*Laws* 1879, *chap.* 541), by adding thereto the following: "Except that lying and situate between Exchange street and the Main and Hamburgh canal."

§ 125(*a*). *When commissioners may be appointed.*—Any railroad company which, prior to the passage of this act (*viz.*, *February* 13, 1851), has been duly formed under the act entitled "An act to authorize the formation of railroad corporations," passed March 27, 1848, or "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, and which is duly continued in existence where, at least, ten thousand dollars for every mile of its railroad proposed to be constructed in this State shall be in good faith subscribed to its capital stock, and ten per cent thereof paid in, may apply to the court

* Laws 1850, chap. 140.

for the appointment of commissioners; and all subsequent proceedings may be had to obtain the title to lands necessary for its construction, 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. (*Laws* 1851, *chap.* 19, § 3, *as amended by Laws* 1853, *chap.* 53, § 1.)

(See note to the next section.)

§ **126.** *The same; when commissioners may be appointed.*—Any railroad company which has been, or which may hereafter be duly formed under the act entitled "An act to authorize the formation of railroad corporations and to regulate same," passed April second, eighteen hundred and fifty, and which is duly continued in existence, when at least ten thousand dollars for every mile of its railroad proposed to be constructed in this State shall be, in good faith, subscribed to its capital stock, and ten per cent thereof paid in, may apply to the court for the appointment of commissioners, and all subsequent proceedings may be had to obtain the title to lands necessary for the construction of its 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. (*Laws* 1867, *chap.* 515, § 1.)

The amendment of 1867, extends the provisions of the section to corporations thereafter to be formed, as well as those in existence at the passage of the act, provided they were formed under the general railroad act of 1850.

The general railroad act of 1850 (chap 140, § 13) provided that any company formed under that act, whenever it was unable to agree for the purchase of any real estate required for the purpose of its incorporation, should have the right to acquire title to the same in the manner and by the special proceedings prescribed in that act. (See § 124, *ante.*)

Section 14 of the act of 1850 (*supra*), provided for the allegations of the petition to be presented to the court for the appointment of commissioners upon the proceedings provided for by the act to acquire title to such land, and, in so doing, declared that the petition should state that the whole capital stock of the company had been in good faith subscribed as required by the act. By laws of 1851 (chap. 19, § 3), it was provided that any railroad company formed under the general railroad act of 1848, and which was duly continued in existence, might apply to the court for the appointment of commissioners when at least ten thousand dollars for every mile of its railroad proposed to be constructed in this State shall be, in good faith, subscribed to its capital stock, and ten per cent thereof paid in, and that commissioners might be appointed and proceedings had thereon to the same extent and in the same manner as if the whole capital stock, specified in its articles of association, was in like manner subscribed. By the laws of 1853 (chap. 53), the act of 1851 was amended by making the provisions therein, which were as above stated made applicable to corporations formed under the general railroad act of 1848, also made applica-

ble to railroad corporations which had been formed prior to the passage of that act (March 25, 1853) under the general railroad acts of 1848 and 1850, and by chapter 515 of the Laws of 1867, given in the text, the provisions allowing application to be made for the appointment of commissioners when ten thousand dollars for every mile of railroad proposed to be constructed in this State is, in good faith, subscribed to the capital stock, and ten per cent thereof paid in, is made applicable to all railroads which have been or hereafter may be formed under the general railroad act of 1850. This amendment as above noted will, of course, cover a corresponding amendment in such cases as above provided for (and when the whole capital stock has not been subscribed), to be made in the contents of the petition. (See § 129, *post.*) Proceedings of commissioners appointed under Laws of 1851 (chap. 19, § 3), must be in conformity with the general act of 1850, and the corporation has a right to appeal from their award under that act. (*Supreme Ct.*, 1852, *Troy and Boston R. R. Co.* v. *Northern Turnpike Co.*, 16 Barb., 100)

Previous legislation.

The following is the previous legislation of which the foregoing is an amendment: Any railroad company formed under the act entitled "An act to authorize the formation of railroad corporations," passed March 26th, 1848, and which is duly continued in existence, when at least ten thousand dollars for every mile of its railroad proposed to be constructed in this State, shall be in good faith subscribed to its capital stock, and ten per cent thereof paid in, may apply to the court for the appointment of commissioners, and the court shall thereupon appoint commissioners, and all subsequent proceedings may be had to obtain the title to lands necessary for its construction, 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. (*Laws* 1851, *chap.* 19, § 3.)

The third section is hereby amended by inserting after the word "1848" the words or "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, so that said section as amended shall read as follows: Any railroad company which, prior to the passage of this act, has been duly formed under the act entitled "An act to authorize the formation of railroad corporations," passed March 27, 1848, or "An act to authorize the formation of railroad corporations and to regulate the same," passed April 2, 1850, and which is duly continued in existence, when at least ten thousand dollars for every mile of its railroad, proposed to be constructed in this State, shall be in good faith subscribed to its capital stock, and ten per cent thereof paid in, may apply to the court for the appointment of commissioners, and all subsequent proceedings may be had to obtain the title to lands necessary for its construction, 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. (*Laws* 1853, *chap.* 53.)

§ 127. *The same, for narrow gauge railroads.*—Any railroad company duly organized according to law, when the gauge of its proposed railroad shall be three feet and six inches or less, but not less than thirty inches within the rail, may, whenever two thousand dollars for every mile of road to be constructed has been in good faith subscribed and ten per cent thereof 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 capital stock specified in its articles of association was in like manner subscribed and ten per cent thereon in like manner paid in cash, and may lay upon such road iron of a weight not less than twenty-five pounds to the lineal yard. (*Laws* 1871, *chap.* 560, *sec.* 6, *as amended by Laws* 1877, *chap.* 103, *sec.* 2, *as amended by Laws* 1879, *chap.* 293, *sec.* 2.) *sub nomine Laws of* 1850 *instead of* 1871.

The same act also provided that any railroad company, then duly organized and legally kept in existence, and which had not constructed its railroad, might, for the purpose of constructing, maintaining and operating a road of such gauge, acquire title to lands in the manner provided above. (*Laws* 1871, *chap.* 560, § 7.)

Previous legislation was as follows:

Any railroad company duly organized according to law, when the gauge 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 towards 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 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, and may use in switches and turnouts iron of not less than thirty pounds to the lineal yard. (*Laws* 1871, *chap.* 560, § 6.)

Any railroad company duly organized according to law, when the gauge 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. (*Laws* 1877, *chap.* 103, § 2.)

§ 128. *Petition to be presented.*—For the purpose of acquiring such title, the said company may present a petition, praying for the appointment of commissioners of appraisal, to the Supreme Court, at any general or special term thereof held in the district in which the real estate described in the

petition is situated. Such petition shall be signed and verified according to the rules and practice of such court. (*Laws* 1850, *chap.* 140, § 14, *as amended by Laws* 1851, *chap.* 19, § 3.)

Questions of regularity in the proceedings such as that the petition upon which the commissioners were appointed was not properly verified, or that it does not appear by the petition that the company had been unable to agree for the purchase of the right of way in question, are properly raised upon the presentation of the petition for the appointment of commissioners of appraisal. (*N. Y. and Erie R. R. Co.* v. *Corey*, 5 How. Pr., 177.) So, also, that the petition nor the map referred to in the petition as filed in the county clerk's office, shows what extent of land is proposed to be taken, or anything more than a line indicating the direction of the proposed railroad. (*Matter of N. Y. and Jamaica R. R. Co.*, 21 How. Pr., 434.) A railroad company, by proceeding under section 14 of the general act to acquire lands, obtain no greater right than the parties against whom they proceed possessed. To acquire a right to use a public square or place for any purpose inconsistent with the object of its dedication, they should proceed under section 26, which provides for cases of lands held in trust. (*Supreme Ct.*, 1854, *Anderson* v. *Rochester, etc., R. R. Co.*, 9 How. Pr., 553; but see *Matter of Boston and Albany R. R. Co.*, 53 N. Y., 574.) that the power given by the general railroad act does not extend to that already held and dedicated by authority of law to a different public use, *e. g.*, a park.

129. *Contents of petition.*—It must contain a description of the real estate which the company seeks to acquire; and it must, in effect, state that the company is duly incorporated, and that it is the intention of the company, in good faith, to construct and finish a railroad from and to the places named for that purpose in its articles of association; *that the whole capital stock of the company has been in good faith subscribed as required by this act* (*see note*); that the company has surveyed the line or route of its proposed road, and made a map or survey thereof, by which such route or line is designated, and that they have located their said road according to such survey, and filed certificates of such location, signed by a majority of the directors of the company, in the clerk's office of the several counties through or into which the said road is to be constructed; that the land described in the petition is required for the purpose of constructing or operating the proposed road; and that the company has not been able to acquire title thereto, and the reason of such inability. The petition must also state the names and places of residence of the parties, so far as the same can by reasonable diligence be ascertained, who own or have, or claim to own or have estates or interests in the said real estate; and if any such persons are infants, their ages, as near as may be, must be stated; and if any of such persons are idiots or persons of unsound mind, or are unknown, that fact must be stated,

together with such other allegations and statements of liens or incumbrances on said real estate as the company may see fit to make. (*Laws* 1850, *chap.* 140, § 14.)

By the preceding section it is required that the petition should state that the whole capital stock of the company has been in good faith subscribed, as required by the general railroad act (but see section 126, *ante*); that in all cases of companies organized under the general act of 1850, the commissioners may be appointed when at least ten thousand dollars for every mile of its road proposed to be constructed in this State shall be in good faith subscribed to its capital stock, and ten per cent thereof paid in. (*Laws* 1867, *chap.* 515, § 1.) In cases as above provided for, and when the whole of the capital stock has not been subscribed, the allegation of the petition should be varied accordingly. (See, also, section 125[*a*], *ante*.)

That this section does not require the petition to state that the company has been unable to agree for the purchase of the property, but that the company has not been able to acquire title thereto and the reason of such inability. (*Matter of the N. Y. C. R. R. Co.*, 20 Barb., 419; see *Dykman* v. *The Mayor, etc.*, and other cases cited in note to section 124, *ante*.) The petition should be accompanied by the notice specified in the text.

When the company takes proceedings to acquire title to land under the provisions of chapter 237 of the laws of 1869 (see section 156, *post*), the petition should disclose the specific purpose to which it is intended to apply the land. In other respects the procedure must conform to the act of 1880. (*N. Y. C. and H. R. R. Co.* v. *Armstrong*, 5 Hun, 86.) In such application, under the act above mentioned, the petition need not state all the facts which are required in the original petition, nor is it necessary to make and file the maps which are required when the company first applied to acquire lands for its road. (*Matter of N. Y. C. and H. R. R. R. Co.*, 4 Hun, 381; id., 6 *Sup. Ct.* [T. & C.], 669.)

In proceedings to acquire land under the general railroad act, the petition must contain such a description of the land sought to be condemned as will show its location and the boundaries thereof. A defective description cannot be remedied by a reference in the petition to a deed. (*In re N. Y. C. R. R. Co.*, 70 N. Y., 191.) In such proceedings extreme accuracy is essential to preserve the rights of all the parties. (*Idem.*)

§ 130. *Petition and notice to be served.*—A copy of such petition, with a notice of the time and place the same will be presented to the Supreme Court, must be served on all persons whose interests are to be affected by the proceedings, at least ten days prior to the presentation of the same to the said court. (*Laws* 1850, *chap.* 140, § 14.)

One object of requiring ten days' notice of the presentation of the petition, to be served, is to afford an opportunity to raise questions of regularity in the proceedings, such as, that the petition is not properly verified, or that it does not appear by the petition that the company has been unable to agree for the purchase of the right of way in question. It is too late to raise such objections on motion to confirm the report. (*N. Y. and Erie R. Co.* v. *Corey*, 5 How. Pr., 177; see note to § 140, *post*.) In answer to an action for trespass, setting up title by virtue of special proceedings under a statute requiring notice of not less

than ten days to persons affected by such proceedings, an allegation that reasonable notice was given, is bad. (*Cruger* v. *H. R. R. R. Co.*, 12 N. Y., 190.)

Under a statute authorizing a railroad company to take private land for the purposes of its road, upon giving notice of the proceedings to the owners, third persons holding liens upon such lands by virtue of judgments recovered, ought to have notice, unless the statute by its terms clearly only requires notice to be given to owners, in which case the judgment creditors are not necessary parties. (*Buffalo Superior Ct., Sp. T.*, 1868, *Watson* v. *N. Y. Central R. R. Co.*, 6 Abb. Pr. N. S., 91.)

Under a proceeding had under the act, prior to the passage of the above section, it was held that when a notice of appraisement of damages for the taking of lands by a railroad company (under Laws of 1847, chap. 31, § 4) is defective, nothing short of an appearance by the party whose lands are sought to be taken and actual litigation upon merits ought to be regarded as an implied waiver of the defect. (*Ct. of Appeals*, 1854, *Cruger* v. *Hudson R. R. R. Co.*, 12 N. Y. [2 Kern.), 190; compare *Dykman* v. *Mayor, etc., of N. Y.*, 5 N. Y. [1 Seld.], 434; affirming S. C., 7 Barb., 498; *Mohawk and Hudson R. R. Co.* v. *Artcher*, 6 Paige, 84.)

§ **131.** *Petition and notice, how served on resident.*—If the person on whom such service is to be made resides in this State, and is not an infant, idiot, or person of unsound mind, service of a copy of such petition and notice must be made on him or his agent or attorney, authorized to contract for the sale of the real estate described in the petition, personally, or by leaving the same at the usual place of residence of the person on whom service must be made as aforesaid, with some person of suitable age. (*Laws* 1850, *chap.* 140, § 14, *sub.* 1.)

Where the person on whom such service was to be made, although a resident of this State, was at the time absent in Europe, held that a service of the notice on a party of suitable age, left in charge of the dwelling house of such person during his absence, was in conformity with the statute. (*In the matter of the N. Y. and Oswego Midland R. Co.*, 40 How. Pr., 335.)

§ **132.** *Petition and notice, how served on nonresident.*—If the person on whom such service is to be made resides out of the State, and has an agent residing in this State, authorized to contract for the sale of the real estate described in the petition, such service may be made on such agent, or on such person personally out of the State; or it may be made by publishing the notice, stating briefly the object of the application, and giving a description of the land to be taken, in the State paper, and in a paper printed in the county in which the land to be taken is situated, once in each week for one month next previous to the presentation of the petition. And if the residence of such person residing out of this State, but in any other of the United States, or in any of the British colonies in North America, is known,

or can by reasonable diligence be ascertained, the company must, in addition to such publication as aforesaid, deposit a copy of the petition and notice in the post-office, properly folded and directed, to such person at the post-office nearest his place of residence, at least thirty days before presenting such petition to the court, and pay the postage chargeable thereon in the United States. (*Laws* 1850, *chap.* 140, § 14, *sub.* 2.)

§ **133.** *Petition and notice, how served on infant.*—If any person on whom such service is to be made is under the age of twenty-one years, and resides in this State, such service shall be made as aforesaid on his general guardian; or if he has no such guardian, then on such infant personally, if he is over the age of fourteen years; and if under that age, then on the person who has the care of, or with whom such infant resides. (*Laws* 1850, *chap.* 140, § 14, *sub.* 3.)

§ **134.** *Petition and notice, how served on idiot, etc.*—If the person on whom such service is to be made is an idiot, or of unsound mind, and resides in this State, such service may be made on the committee of his person or estate; or if he has no such committee, then on the person who has the care and charge of such idiot or person of unsound mind. (*Laws* 1850, *chap.* 140, § 14, *subd.* 4.)

§ **135.** *Petition and notice, how served on unknown party.*—If the person on whom such service is to be made is unknown, or his residence is unknown, and cannot by reasonable diligence be ascertained, then such service may be made, under the direction of the court, by publishing a notice, stating the time and place the petition will be presented, the object thereof, with a description of the land to be affected by the proceedings, in the State paper, and in a paper printed in the county where the land is situated, once in each week for one month previous to the presentation of such petition. (*Laws* 1850, *chap.* 140, § 14, *subd.* 5.)

§ **136.** *How served in cases not provided for.*—In all cases not herein otherwise provided for, service of orders, notices, and other papers in the special proceedings authorized by the act, may be made as the Supreme Court shall direct. (*Laws* 1850, *chap.* 140, § 14, *subd.* 6.)

§ **137.** *Service by publication to lot owners on line of streets in cities and villages.*—Whenever any land required by a railroad company for the purposes of its road, is contained in, or form a part of any street or avenue in any city

or village in which the owners of adjoining lands on the line of such street or avenue claims a right of property or the fee thereof, in such case the notice to be given of the application for the appointment of commissioners under the special proceedings under the act to acquire title to such land, as well as the notice of hearing before such commissioners, shall be served by the publication of the said notice twice each week, for three weeks, in at least two newspapers published in the county in which such city or village is located, to be designated by the court to which the said application is to be made. (*Laws* 1876, *chap.* 198, § 2.)

The provision of the act of 1876 (sec. 2, chap. 198, Laws of 1876), providing for the publication of notice of application for the appointment of commissioners whenever land "required by a railroad company for the purposes of its road" forms part of any street or avenue, "which the owners of adjoining lands * * * claim a right of property or the fee thereof," applies only to a case when the fee of the land itself is required by the company for its roadway, and is sought to be acquired as authorized by the act of 1854 (sec. 4, chap. 282, Laws of 1854). It does not apply to proceedings by such company to acquire land "for the purposes of its incorporation." Under the act of 1850 (sec. 13, *et seq.*) it also applies only when the adjoining owners have the fee. (*In re N. Y. C. R. R. Co.*, 77 N. Y., 248.)

§ **138.** *Interests of infants and persons of unsound mind, how protected.*—In case any party to be affected by the proceedings is an infant, idiot, or of unsound mind, and has no general guardian or committee, the court shall appoint a special guardian or committee to attend to the interests of such person in the proceedings; but if a general guardian or committee has been appointed for such person in this State, it shall be the duty of such general guardian or committee to attend to the interests of such infant, idiot, or person of unsound mind; and the court may require such security to be given by such general or special guardian or committee, as it may deem necessary to protect the rights of such infant, idiot, or person of unsound mind; and all notices required to be served in the progress of the proceedings may be served on such general or special guardian or committee. (*Laws* 1850, *chap.* 140, *subd.* 6.)

Where one of the owners of land taken is an infant, it is indispensable that some proper person should be appointed to appear before the appraisers, to represent and attend to the interest of such infant on the appraisement; and the statute is not complied with simply by an appointment of an attorney for the infant owner sufficient in form; but it is the duty of the company to see that some reliable person, residing in the vicinity, be appointed, who should in fact personally appear and protect the interests of the infant. Without such appointment and appearance all the proceedings of the jury affecting such interests, are unauthorized and void, and the appointment of the attorney is nugatory. (*Hotchkiss* v. *Auburn and Rochester R. R. Co.*, 36 Barb., 600.)

§ **139.** *Protection of rights of unknown party.*—The court shall appoint some competent attorney to appear for, and protect the rights of any party in interest who is unknown, or whose residence is unknown, and who has not appeared in the proceedings by an attorney or agent. (*Laws* 1850, *chap.* 140, § 20.)

(See note to § 138, *ante.*)

§ **140.** *Appointment of commissioners.*—On presenting such petition to the Supreme Court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county or some adjoining county where the premises to be appraised are situated, commissioners to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken in such county for the purposes of the company, and to fix the time and place for the first meeting of the commissioners. (*Laws* 1850, *chap.* 140, § 15, *as amended by Laws of* 1854, *chap.* 282, § 2.)

The burden of proving by legal evidence that the facts alleged in the petition are not true is, by the above section, cast upon the owner of the land, and an affidavit or answer is not sufficient for that purpose. (*Matter of N. Y. Bridge Co.*, 4 Hun, 635.)

The statute (Laws of 1850, chapter 140, sections 14–16) authorizes a joint commission comprehending all the land owners embraced in one petition. Thus, by section 15, five persons may appraise all lands proposed to be taken in the county, and section 16 evidently contemplates a succession of appraisals by the same commissioners. One report may also embrace all the cases; and any person interested and made a party can appeal from such part thereof as affects him. (*Supreme Ct., Sp. T.*, 1851, *Troy and Rutland R. R. Co.* v. *Cleveland*, 6 How. Pr., 238.) If any of the facts alleged in the petition are denied, an issue is raised, and the court is to hear the proofs and allegations of the parties; but legal evidence only is allowable to disprove the facts alleged in the petition, and affidavits read to disprove the facts must be excluded from consideration. (*Buffalo and State Line Co.* v. *Reynolds*, 6 How. Pr., 96.) Should any of the commissioners die, or refuse or neglect to serve, or be incapable of serving, it is the duty of the court to make appointments to fill the vacancies. See section 152, *post.*)

Upon motion, one special term has power to vacate the order made by another, and appoint new commissioners, and such order being discretionary, is not the subject of review on appeal. If such first order was obtained *ex parte*, or the person, being free from any fault, was prevented from appearing at the

hearing, and injustice has been done him, it is the duty of the court to open the default and afford the injured party the relief to which he may be entitled. (*Matter of N. Y. and Oswego Midland R. R. Co.*, 49 How. Pr., 335.) It is too late to raise objections to the regularity of the proceedings on the presentation of the petition to appoint commissioners; on motion to confirm the commissioners' report. (*N. Y. and Erie R. R. Co.* v. *Corey*, 5 How. Pr., 107.) An appearance and litigation upon the merits, is *held* to be a waiver of defects otherwise available. (*Mohawk, etc., R. R. Co.* v. *Artcher*, 6 Paige, 84; *Dyckman* v. *Mayor, etc.*, 1 Seld., 434.)

Under the general railroad act, the question as to the necessity of the appropriation of lands for the use of a railroad corporation is a judicial one for the court to determine, and, when controverted, the facts must in some form be presented to the court to enable it to decide. (*In re N. Y. C. R. R. Co.*, 66 N. Y., 407.) Where a railroad corporation makes application to acquire land, in addition to that which it is entitled to take for its roadway, and objections are made by the owners, coupled with a denial of the specific allegations of the petition respecting the purposes for which the land is required, the burden is upon the petitioner of advancing proof of the special circumstances alleged in support of the averment that it requires the land. (*Idem.*) The provisions of the general railroad act (section 15, chapter 140, Laws of 1850, as amended by section 2, chap. 282, Laws of 1854), authorizing the land owner to disprove the allegations of the petition, was intended to enable him to introduce proof upon his part to meet that offered by the petitioner and to disprove allegations of the petition capable of being disproved, as to the special circumstances lying within the knowledge of the petitioner, it is put to its proofs if the owner show sufficient cause against the petition. (*Idem.*) Provision in order appointing commissioners that it should not affect any rights or interests of the city corporation in the streets or avenues, held not to conflict with the rights to acquire the lands of the individual owners in the first instance. (*In re N. Y. C. R. R. Co.*, 77 N. Y., 248.)

The original section 15 of chapter 140, Laws of 1850, previous to the amendment, was as follows: On presenting such petition to the Supreme Court as aforesaid, with proof of service of a copy thereof and notice as aforesaid, all persons whose estates or interests are to be affected by the proceedings may show cause against granting the prayer of the petition, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of five disinterested and competent persons, who reside in the county where the premises to be appraised are situated, commissioners, to ascertain and appraise the compensation to be made to the owners or persons interested in the real estate proposed to be taken in such county for the purposes of the company, and to fix the time and place for the first meeting of such commissioners. The parties whose lands are to be appraised, or their attorneys, may, in case they appear, name six such persons, and the company a like number, provided they do so, and the court shall appoint two of the commissioners from each of the six so named, in case there is no legal objection to such appointment, and the other commissioner shall be appointed by the court in its discretion. (*Laws* 1850, *chap.* 140, § 15.)

§ 141. *The action of the commissioners and their report.* —The commissioners shall take and subscribe the oath pre-

scribed by the twelfth article of the constitution. Any of them may issue subpœnas and administer oath to witnesses; a majority of them may adjourn the proceedings before them from time to time, in their discretion.

Whenever they meet, except by the appointment of the court, or pursuant to adjournment, they shall cause reasonable notice of such meetings to be given to the parties interested, or their agent or attorney.

They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in such case is closed, they, or a majority of them, all being present, shall, without any unnecessary delay, and before proceeding to the examination of any other claim, ascertain and determine the compensation which ought justly to be made by the company to the owners or persons interested in the real estate appraised by them; and in fixing the amount of such compensation, said commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties interested may derive from the construction of the proposed railroad, or the construction of the proposed improvement connected with such road for which such real estate may be taken.

They, or a majority of them, shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any unknown owner or party in interest, not personally served with notice of the proceedings, and who has not appeared, for costs, expenses and counsel fees. The said commissioners shall make a report of their proceedings to the Supreme Court, with the minutes of the testimony taken by them, if any; and they shall be entitled to five dollars for services and expenses for every day they are actually engaged in the performance of their duties, to be paid by the company, except where the owners or persons interested in the real estate fail to have awarded them more than the amount of compensation offered them by the company before the appointment of commissioners, then to be paid by the said owners or persons interested, or if not paid by them, to be paid by the company and deducted from the amount awarded. (*Laws* 1850, *chap.* 140, § 16, *as amended by Laws* 1854, *chap.* 282, § 3, *as amended by Laws* 1864, *chap.* 582, § 4.)

(See notes to § 149, *post*, and § 183, *post*.)

The foregoing provisions of the statute do not require compensation to be made to one whose land has not been taken for railroad purposes, even though

he suffers indirect and consequential injuries by reason of the construction of such road (*Arnold* v. *Hudson River R. R. Co.*, 49 Barb., 108; *Drake* v. *Same*, 7 id., 508; *Barnes* v. *Southside R. R. Co.*, 2 Abb. Pr. [N. S.], 415.) That similar statutory provisions requiring compensation to be assessed to the owners or persons interested in the land taken for public use, does not include the wife of the owner of the fee. She is divested of her inchoate right or possibility of dower, when the land is taken from the husband in his lifetime by regular proceeding, and he is duly compensated therefor. (*Moore* v. *Mayor, etc., of N. Y.*, 8 N. Y., 100; affirming S. C., 4 Sandf., 456.) The commissioners ought to take into consideration and determine the compensation to be made to a mortgagee of the lands so taken, and the fact that the mortgage debt is not then due, makes no difference. (*Matter of John and Cherry Streets*, 19 Wend., 659.) And a railroad company who have appropriated lands which are subject to a mortgage, have a right to redeem their lands from the lien of the mortgage on the payment of a ratable proportion of the mortgage debt, which they must do to the full value of the property, if need be, irrespective of the improvements put thereon by the company. (*Supreme Ct., Sp. T.*, 1858, *Dows* v. *Congdon*, 16 How. Pr., 571.) That a widow is within the statutory provisions, and that it is the duty of the commissioners to assess the value of her life estate or dower in such lands, and award it to her as damages. (*Matter of William and Anthony Streets*, 19 Wend., 678).

Commissioners are not like other tribunals, to be governed exclusively by evidence. They are required to view the premises as well as to hear the proofs and allegations of the parties. (*Troy and Boston R. R. Co.* v. *Lee*, 13 id., 169.) The land owner, whose compensation is the subject of appraisal and determination, has full opportunity to be heard. (*N. Y. and Erie R. R. Co.* v. *Coburn*, 6 How. Pr., 223.) The land owner has the right to produce before the commissioners, and it is the duty of the commissioners to hear, any and all evidence which would be competent in courts of law upon similar questions. (*Rochester and Syracuse R. R. Co.* v. *Budlong*, 6 How. Pr., 467.) Where the commissioners were required "to view the premises and hear the proofs and allegations of the parties," it is discretionary with them to determine the order in which they shall proceed. They must not omit to hear the proofs and allegations of the parties, but whether they shall hear before or after viewing the premises is for them to decide. They may also determine which party shall open and close the argument. (*Albany Northern R. R. Co* v. *Lansing*, 16 Barb., 68.) The established rules of evidence must be their guide in these proceedings. (*Troy and Boston R. R. Co.* v. *Northern Turnpike Co.*, 16 Barb., 100.) No testimony should be received which a court of law would reject and none rejected which a court of law hold to be admissible. (*Idem.*) The report may embrace a succession of appraisals by the same commissioners. (*Troy and Rutland R. R. Co.* v. *Cleveland*, 6 How. Pr., 238.)

When the commissioners make a report to the court, and by an order are permitted to amend or correct it, so as to conform it to the state of facts which existed, they have no right, at the time of such correction, to hear proofs by claimants as to damages. When they have viewed the premises and decided upon the amount of damages to be paid, their powers under their appointment are exhausted, so far as the amount of damages is concerned, until the further order of the court. Where it appears that the commissioners have been regular in their proceedings, and due notice of the motion for con-

firmation has been given, it is a matter of course and required that the court should confirm the report. It seems therefore that claimants for damages, in presenting their objections, have no redress (unless by leave of the commissioners) when they fail to appear at the time appointed by the commissioners to view the premises and award damages, when the proceedings are all regular on the part of the commissioners. If the party deems himself aggrieved by the decision of the commissioners, he must bring the matter before the court on appeal. (*N. Y. and Erie R. R. Co.* v. *Corey*, 5 How. Pr. R., 177.)

Though section 16 of the act requires the report to be signed by a majority of the commissioners, they need not all be together at the signing, as it involves no deliberative or judicial action. (*Supreme Ct.*, 1854, *Rochester and Genesee Valley R. R. Co.* v. *Beckwith*, 10 How. Pr., 168.) The fact that the wife of a commissioner to appraise damages is cousin to one of the stockholders of the railroad will not vitiate the appraisement. (*Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co.* v. *Cramer*, 7 How. Pr., 164.)

The commissioners are to determine the compensation to be made to the owner for the land "proposed to be taken" and "appraised by them," and not the damages that will be occasioned by the construction and operation of the railroad over his premises. Where they permitted witnesses to give conjectural opinions as to the damage which would result to a mill on the owner's adjoining land, the award was set aside. The true and only inquiry is, what is the property worth now in the market, and what will it be worth after the improvement is made. (*Supreme Ct.*, 1852, *Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169. *Sp. T.*, 1853 [citing, also, 16 Barb., 68, 100], *Canandaigua and Niagara Falls R. R. Co.* v. *Payne*, 16 id., 273.) The commissioners should award damages for the market value of the land taken, and the diminution in the market value of the owner's adjoining land produced by the taking. They are to determine how much the mere taking of the land, not the use of it for a railroad or any particular purpose, will diminish the market value, and this diminution and the market value of the land taken, should be the amount of their award. (*Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co.* v. *Lansing*, 16 Barb., 68; see 13 Barb., 169.) No action will lie to recover damages for a depreciation in value, of the portion not taken, in addition to the compensation properly awarded for the portion taken. (*Furniss* v. *Hudson River R. R. Co.*, 5 Sandf., 551.)

The proper inquiry for the commissioners is, what is the fair marketable value of the whole property, and then what will be the fair marketable value of the property not taken; the difference will be the true amount of compensation to be awarded. (*Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169; *Canandaigua, etc., R. R. Co.* v. *Payne*, 16 id., 273; see also *Matter of Furman Street*, 17 Wend., 650; *Matter of William and Anthony Streets*, 19 id.) In appraising lands to be taken for a railroad, the commissioners are not authorized to allow, beyond the value of the land taken, consequential damages for injury anticipated to be incurred to adjoining property of the claimant, through the works of the company, *e g.*, injury which may be caused by fire set by sparks from the company's locomotives. (16 Barb., 68; id., 273; 13 id., 169; *Supreme Ct.*, 1868, *Matter of Union Village and Johnsonville R. R. Co.*, 53 Barb., 457; S. C., 35 How. Pr., 420; citing *Alb. Northern R. R. Co.* v. *Lansing*, and *Troy and Boston R. R. Co.* v. *Lee*, *supra*.) It has however been held that everything which would depreciate the value of the residue was to be taken into account. So if

its value was depreciated by the noise, smoke, or increased danger, or because it was more exposed to fire, or more difficult of access, all such considerations were to be included in the estimate of damages. (*Matter of the Utica, etc., R. R. Co.*, 56 Barb., 456.) In this latter case the same authorities were cited as in 53 Barbour, *supra*, and also citing *Rood* v. *N. Y. and Erie R. R. Co.* (18 Barb., 80). The court said that if a party conveys his land to a railroad company for the roadway, he cannot afterwards recover damages caused by fire by operating the road when no negligence was proven, and that this was because of the presumption that the parties had that risk in view when the sale was made and that part of the consideration paid was intended to cover that risk. (See note to section 594, *post*, in regard to liability of company for fires.) And it was decided in New Jersey, that in assessing damages for crossing land by a railroad, the jury must take into consideration the deterioration in value of the adjacent parts of the same tract, by the proximity of the railroad, either for agricultural purposes or for sale as building lots, increased risk of an increased care required for family and stock, the risk of fire, the inconvenience caused by embankments and excavations, and the obstruction to the free use of buildings. Ogden, J., dissenting as to risk to family, stock, and by fire. (*Somerville and Easton R. R. Co.* v. *Doughty*, 2 Zabriskie, 495.)

The present value of lands taken must be awarded, and damages to adjoining lots must be assessed, on the basis of the present value; but to ascertain the present value of lands it is right to regard their location, and to judge by the probable uses to which they will be put, and for which they can be sold, in the same manner as their value would be fixed by a prudent seller or purchaser. (*Idem.*) A jury, in assessing the value of lands, are not to be governed by the prices which they would bring at a forced cash sale, but by such prices as they believe the lands would bring in the hands of a prudent seller, at liberty to fix the time and condition of sale (*Idem.*) In assessing damages to the owner of land occupied by a railroad, the true rule is a fair and just compensation of the value of the whole tract through which the road passes, before and after the improvement is made. (*Penn. R. R.* v. *Heister*, 8 Barr., 445.)

Appraisers to value land taken by a railroad company are not authorized to appraise the land of an individual with a reservation of easements and privileges to the owner. They must appraise the land at its actual value. Therefore, where the inquisition stated that the award of damages was "based on the supposition and made on the condition and with the understanding" that the owners of the land might open a street across the railroad—*Held*, on *certiorari* brought by the owners, that the appraisement was illegal and that the inquisition should be set aside. (*Hill* v. *Mohawk and Hudson R. R.*, 5 Denio, 206.)

That the opinions of witnesses as to the effect the railroad will have in frightening horses and that a bridge ought to be built in consequence thereof, are not admissible, see *Rochester and Syracuse R. R.* v. *Budlong* (*supra*).

Where, by order of the court, the commissioners are permitted to amend or correct their report, so that it shall conform to the true state of facts, they have no right at the time of such correction to hear proofs by claimants as to damages. (*N. Y. and Erie R. R. Co.* v. *Corey.*, 5 How. Pr., 177.)

In proceedings by a railroad corporation to acquire a right to lay down its tracks in a street or highway, the fee of which is in the owner of the adjoining land, the proper compensation is, *first*, the full value of the land taken; *second*, a fair and adequate compensation for all the injury the owner has sustained and

will sustain by the making of the railroad over his land, and for this purpose it is proper to ascertain and determine the effect the conversion of the street into a railroad track will have upon the residue of the owner's land. (*Henderson* v. *N. Y. Cent. R. R. Co.*, 78 N. Y., 518.)

The right to maintain a water course over land is "property," protected by the constitution, and cannot be impaired without compensation. (*Arnold* v. *Hudson R. R. R. Co.*, 55 N. Y., 661, reversing 49 Barb., 108.) Compensation does not cover damages for unauthorized entry. (*Blodgett* v. *Utica and Black River R. R. Co.*, 64 Barb., 580.)

Mr. Justice Johnson gave the following opinion, in the case of *Rochester and Syracuse R. R. Co.* v. *Budlong*, 6 How. Pr. R , 467:

By the court, Johnson, Justice.—On the hearing before the commissioners, as appears by their report of the proceedings and evidence now before us, the appellant offered, among other things, to prove by competent witnesses how much, in their opinion, his property would be diminished in value by taking from it the piece of land proposed to be taken by the company; taking the situation of the fields, the facilities of water for farming purposes, and the construction of the road as the company propose to build it, into the account. He also offered to prove by the opinions of witnesses what damages he would sustain by the taking of the land and the construction of the road, in carrying on his farm as he had been accustomed before to use it for the purposes of cultivation and grazing. The commissioners overruled all questions of the latter and several of the former character as incompetent.

In the case of *McBurney and Bacon* v. *The New York and Erie R. R. Co.*, the Supreme Court in this district, at the general term in December, 1850, held that it was the right of the land owner, whose compensation was the subject of appraisal and determination, to produce before the commissioners, and the duty of the commissioners to hear any and all evidence which would be competent by the rules of evidence upon trials in courts of law upon similar questions. And we also held in that case that it was the duty of the commissioners, after viewing the premises and hearing the evidence, to decide from the evidence furnished by their view as well as from the testimony of the witnesses before them. That they were to exercise their own judgments, founded upon the view in connection with the other evidence, and not to the exclusion of it.

And we further held in the same case, that opinions of witnesses competent to judge, as to the value of the farm, as land was usually valued and sold in the neighborhood, as a whole, and its relative value after the quantity surveyed and proposed to be taken, should be taken for the use of the company, were proper as evidence, and we ordered a new appraisal for the rejection of such evidence.

It is exceeding difficult to lay down any general rule of evidence by which damages are to be ascertained which will furnish a just and proper standard for every case. The boundary between judgment founded upon knowledge of facts, and that which is based upon speculation and hypothesis merely, is often confused and somewhat difficult to trace. But the opinions of witnesses competent to form a proper judgment in regard to the value of the property for the purposes of selling, or renting, or hiring, and how that value would be affected by the injury complained of, has always been regarded as pertinent evidence. The same rule prevails in regard to real and personal property, although real estate can scarcely be said to have any market value, strictly speaking. It has,

however, a known and appreciable value quite as definite and certain, and as well understood by those acquainted with real estate in the vicinity, as any commodity vendible in market. The object of an appraisal is to make the owner of the land good, by rendering an equivalent in money for the loss he sustains in the value of his property, by being deprived of a portion of it. This, it is obvious, must be the main ingredient in the compensation which the commissioners are to determine. Compensation includes not only the value of the portion taken, but the diminution of the value of that from which it is severed also. And this may always be proved by the opinions of competent witnesses.

On the other hand, the opinions of witnesses, however well informed as to how much a party seeking redress will be injured or damnified in other respects, independent of this diminution of value, have been pretty uniformly rejected. In such cases it is obvious that opinions would be mere matter of speculation, upon which no two would be likely to agree, having no common and universally recognized standard to appeal to.

In all such cases the facts and circumstances must be laid before the tribunal called upon to determine, and they must draw the inference. In this view of the proper mode of proceeding, the appellant has been deprived of some evidence that he was fairly entitled to, while much that was offered was very properly rejected.

In cases of this kind where the persons who are to pass upon the question of compensation are authorized to exercise their own judgment, formed after a deliberate examination of the subject of appraisal personally, and are therefore qualified to correct any exaggerated estimate testified to by witnesses, it cannot be necessary to go beyond the rules of law in excluding evidence, or even to insist upon the most exact and rigid strictness. Though the general rules of evidence, fairly interpreted, should undoubtedly be adhered to in the admission and rejection of testimony offered.

We do not undertake to pass upon the amount of compensation awarded by the commissioners, whether it is too great or too small. Nor should we feel at liberty to interfere with the report upon that ground, unless the evidence of injustice was palpable upon its face. It is sufficient that the appellant was deprived of evidence that he was entitled to have considered, the judgment of intelligent and competent witnesses, to call upon the court to set the appraisal aside. Whether the evidence offered and rejected improperly, would have influenced the decision had it been received and weighed, it is not necessary to decide. We are to presume, however, that it would have received its proper attention, and had its due weight in the decision.

It is enough that the appellant was entitled to it, and that it might, had it been received and considered, led to a more favorable determination in his favor. The report and appraisal must, therefore, be set aside, and a new appraisal ordered before new commissioners. (See *R. & Oneeyo R. R. Co.* v. *Deyo*, 5 Lans., 298; *Black River* v. *M. R. R. Co.*, 9 Hun, 104; and *N. Y. C. & H. R. R. R Co.* v. *Judge*, 15 id., 63.)

The following is the decision of the Supreme Court in the case of *The Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169. The appeal was in pursuance of section 18. Justice Harris says:

The statute while it gives to either party an appeal to the Supreme Court from the appraisal made by commissioners, and authorizes the court, in its dis-

cretion, to direct a new appraisal, before the same or new commissioners, has not prescribed the principles by which the court is to be governed in its decision upon such appeal. I think it quite obvious that the review is not to be had upon the same principles by which the court is guided in reviewing the proceedings of a judicial tribunal. Any technical departure from established rules in the admission or rejection of evidence cannot be allowed to affect the appraisal, unless it appears that such error has injuriously affected the party appealing. The commissioners are not, like other tribunals, to be governed exclusively by evidence. They are required to view the premises, as well as to hear the proofs and allegations of the parties. The one duty is not less imperative or important than the other. The commissioners are selected with a cautious regard to their fitness to judge, after qualifiying themselves in the manner prescribed, of the compensation which ought justly to be made for the land to be taken. If the court, upon appeal, are satisfied that they have not erred in the principles upon which they have made their appraisal, no other error will be sufficient to send the report back for review.

It appears from the minutes of testimony taken by the commissioners, that the defendant's farm contains about fifty acres, and that the railroad so divides it as to leave about thirty-five acres on one side and fifteen acres on the other. Witnesses were called by the defendant to give their opinion as to the amount of damage he would sustain. This kind of testimony was objected to, but received. One witness testified that he would not give so much for the farm by one thousand dollars as he would if it had not been interfered with. Another estimated the farm to be worth fifty dollars an acre without the railroad, and twenty dollars an acre less with the railroad in operation. A third witness thought the farm as it would be, with the railroad running through it, not worth twenty dollars an acre; and a fourth thought the farm would be comparatively valueless for farming purposes. These opinions constitute the chief part of the testimony taken. Such testimony, although admissible, is not entitled to great weight. Indeed, it is a departure from a general rule of evidence to receive it at all. "The whole history of this kind of evidence," says a distinguished judge, "shows that it is separated from incompetency by a very thin partition." (*In the matter of Pearl Street*, 19 Wend., 651, per Cowen, J.) The opinions of witnesses, at the best, are to be received as "persuasive evidence," and never controlling.

In making appraisals of this kind, the true rule, the only rule which will do equal justice to all parties, is to determine what will be the effect of the proposed change upon the market value of the property. The proper inqury is, what is it now fairly worth in the market, and what will it be worth after the improvement is made? "All classes and conditions of men," says Bronson, J., in the *Matter of Firman Street* (17 Wend., 649), "hold their property subject to the paramount claims of the State, and when it is taken for public purposes, and the question of compensation is presented, the only proper inquiry is, what is its value? The question is not what estimate does the owner place upon it, but what is its real worth, in the judgment of honest, competent and disinterested men?" And again he says, "The proper mode of adjusting the question of damages is to inquire, what is the present value of the land, and what will it be worth when the contemplated work is completed?"

The verdict of a jury is determined by the testimony submitted to their consideration. It is therefore the subject of review. It may be presented to the

consideration of the court upon paper. But it is not so in relation to these commissioners of appraisal. The very first thing they are required to do is, to view the premises. Thus their own senses are made to testify. The information thus acquired it is impossible to bring before a court of review. The commissioners, too, are selected with reference to their general knowledge, qualifying them to judge discreetly upon the matters submitted to them. Unlike a jury, they are restricted to no peculiar species of evidence or any peculiar sources of information. They may collect information in all the ways which a prudent man usually takes to satisfy his own mind concerning matters of the like kind, where his own interests are involved in the inquiry. They may seek light from other minds, that they may be the better able to arrive at just conclusions, but at the last they must be governed by their own judgment. That judgment is not to be controlled or outweighed by the opinions of any number of witnesses. The commissioners have no right to take such opinions nor indeed any other evidence as the basis of their appraisal, without exercising their own judgment. They are to hear all the proofs and allegations of the parties, as well as to view the premises, as a means of enlightening their judgment, and having done all, they are then to determine, in the free and uncontrolled exercise of that judgment, thus enlightened and thus informed, what award will best dispense equal justice to all parties. When the original jurisdiction is to be exercised in this manner, it is impossible, from the very nature of the case, that there should be any thing like a regular judicial review. (See opinion of Bronson, J., in the *William and Anthony Streets*, 19 Wend., 678.)

Regarding the market value of the property, as furnishing the true principle by which the commissioners are to be governed, and the independent exercise of their intelligent judgment as the true mode of applying that principle to the appraisal, it is scarcely possible for a court to say, upon review, that the commissioners erred. Indeed this can never be said, unless it can be made to appear that they have adopted an erroneous principle in making their appraisal or have erred in the application of the true principle. Neither can be said to appear in this case. There is nothing here to show that the appraisal is not the result of the free exercise of the judgment of the majority of the commissioners who signed the report in reference to the market value of the property as it was before the railroad was constructed and as it will be afterwards. If it is, the report ought not to be disturbed. And perhaps, in strictness, this should be sufficient to justify the court in denying the application to send it back for review. But, from the amount of the award, taken in connection with the character of the testimony submitted to the commissioners, and the farther fact that two very intelligent commissioners have omitted to unite in the appraisal, the court are apprehensive that the majority of the commissioners may possibly have felt themselves overruled by the opinions of others, and have made those opinions, rather than their own judgment, the basis of their appraisal. For this reason, and not so much for the purpose of correcting any error as to enable the commissioners to review their own decision and see whether, upon the prrinciples now stated, they have committed any error, we have thought it a discreet exercise of the power which the Legislature has thought fit to vest in in this court, to send the proceedings back to the same commissioners for review. Their second report will of course be final. (See *Henderson v. N. Y. C. R. R. Co.*, 78 N. Y., 423, and cases there cited; see also 5 T. & C., 63; 6 id., 21.)

Previous legislation.

The previous legislation upon this subject was as follows: The commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas, administer oaths to witnesses, and any three of them may adjourn the proceedings before them from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause reasonable notice of such meetings to be given to the parties who are to be affected by their proceedings, or their attorney or agent. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony, if any is taken by them, to writing; and after the testimony is closed in each case, and without any unnecessary delay, and before proceeding to the examination of any other claim, a majority of them, all being present and acting, shall ascertain and determine the compensation which ought justly to be made by the company to the party or parties owning or interested in the real estate appraised by them; and in determining the amount of such compensation they shall not make an allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad. They, or a majority of them, shall also determine and certify what sum ought to be paid to a general or special guardian or committee of an infant, idiot, or person of unsound mind, or to an attorney appointed by the court to attend to the interest of any unknown owner or party in interest not personally served with notice of the proceedings, and who has not appeared, for costs, expenses and counsel fees. They shall make a report to the Supreme Court, signed by them or a majority of them, of the proceedings before them, with the minutes of the testimony taken by them, if any. Said commissioners shall be entitled to three dollars for their expenses and services for each day they are engaged in the performance of their duties, to be paid by the company. (*Laws* 1850, *chap.* 140, § 16.)

The commissioners shall take and subscribe the oath prescribed by the twelfth article of the constitution. Any one of them may issue subpœnas and administer oaths to witnesses; a majority of them may adjourn the proceedings before them, from time to time, in their discretion. Whenever they meet, except by the appointment of the court or pursuant to adjournment, they shall cause reasonable notice of such meetings to be given to the parties interested, or their agent or attorney. They shall view the premises described in the petition, and hear the proofs and allegations of the parties, and reduce the testimony taken by them, if any, to writing, and after the testimony in each case is closed, they or a majority of them, all being present, shall, without any unnecessary delay, and before proceding to the examination of any other claim, ascertain and determine the compensation which ought justly to be made by the company to the owner or persons interested in the real estate appraised by them; and in fixing the amount of such compensation, said commissioners shall not make any allowance or deduction on account of any real or supposed benefits which the parties in interest may derive from the construction of the proposed railroad, or the construction of the proposed improvement connected with such road for which such real estate may be taken. They, or a majority of them, shall also determine what sum ought to be paid to the general or special guardian or committee of an infant, idiot or person of unsound mind, or to an attorney appointed by the court to attend to the interests of any un-

known owner or party in interest, not personally served with notice of the proceedings, and who has not appeared for costs, expenses and counsel fees. The said commissioners shall make a report of their proceedings to the Supreme Court, with the minutes of the testimony taken by them, if any; and they shall each be entitled to five dollars for their services and expenses for every day they are actually engaged in the performance of their duties, to be paid by the company. (*Laws* 1854, *chap.* 282, § 3.)

§ **142.** *Change of ownership not to affect appraisal.*—When any proceedings of appraisal shall have been commenced, no change of ownership by voluntary conveyance or transfer of the real estate or any interest therein, or of the subject-matter of the appraisal, shall in any manner affect such proceedings, but the same may be carried on and perfected as if no such conveyance or transfer had been made or attempted to be made. (*Laws* 1854, *chap.* 282, § 6.)

§ **143.** *Report, how confirmed.*—On such report being made by said commissioners, the company shall give notice to the parties, or their attorneys, to be affected by the proceedings, according to the rules and practice of said court, at a general or special term thereof, for the confirmation of such report; and the court shall thereupon confirm such report and shall make an order containing a recital of the substance of the proceedings in the matter of the appraisal, and a description of the real estate appraised for which compensation is to be made; and shall also direct to whom the money is to be paid, or in what bank, and in what manner it shall be deposited by the company. (*Laws* 1850, *chap.* 140, § 17.)

There is no obligation imposed on the company to take the land until the confirmation of the report of the commissioners to assess the damages, and as to this point the court has power, on the application of the company to discontinue the proceedings. (*Matter of Syracuse, Binghamton and N. Y. R. R. Co.*, 4 Hun, 311.)

No error of law committed by the commissioners in their decision of the merits, or upon the admission or rejection of evidence, can be reviewed or examined on the application to confirm their report. Such decisions can only be reviewed on appeal from their appraisal under section 18 of the act. (5 How. Pr., 177; 6 id., 223, 467; *Supreme Ct.*, 1854, *Rochester and Genesee Valley R. R. Co.* v. *Beckwith*, 10 How. Pr., 168.) When a report of commissioners of appraisement is made, which, upon its face, appears to conform in substance to the requirements of the act, and notice is given according to the rules and practice of the court for its confirmation, it is the duty of the court to confirm it. No affidavits or other proof should be heard on such application, to contradict or impeach the truth of the matters contained in the report. (*Id.*) But if the report should be untrue in any material respect, or the proceedings of the commissioners have been irregular, and their report fails to state the facts constituting such irregularity, upon a proper application directly made to the

court on the part of the person opposed to the corporation the court would be authorized to set aside and vacate the report. (*Id.*)

On a motion to confirm the report of commissioners in acquiring lands for a railroad—*Held*, that the court could not consider any of the objections or exceptions, except that which stated that neither the report nor any of the proceedings which preceded it, properly designated the lands proposed to be taken. All the other objections and exceptions must be considered on appeal from the report after confirmation. (*Sup. Ct., Sp. T.*, 1860, *Matter of N. Y. and Jamaica R. R. Co.*, 21 How. Pr., 434.) If the report, in addition to the route, gives the quantity of the land to be taken, and a diagram showing its boundaries, and length and width throughout its whole extent, this is a sufficient description. (*Id.*) The objection that neither the petition nor the map filed in the office of the county clerk to which it refers, shows what extent of land was to be taken, nor anything more than a line showing the direction of the proposed railway, should be taken on the presentation of the petition on the motion for the appointment of commissioners. (*Id.*)

The act (Laws of 1850, 211) does not give the court power to set aside the report of commissioners upon motion. After the report is confirmed, either party may appeal, and on the hearing of such appeal, the court may direct a new appraisal before the same or new appraisers, in its discretion. But it can exercise no powers not given by the act. (20 Johns., 268; 2 Hill, 14; *Supreme Ct., Sp. T.*, 1852, *Albany Northern R. R. Co.* v. *Cramer*, 7 How. Pr., 164; see, also, *N. Y. and Erie R. R. Co.* v. *Corey*, 5 id., 177; *N. Y. and Erie R. R. Co.* v. *Coburn*, 6 id., 223; *Rochester and Syracuse R. R. Co.* v. *Budlong*, id., 467; *Rochester, etc., R. R. Co.* v. *Beckwith*, 10 id., 169; but see *In re N. Y. C. R. R. Co.*, 64 N. Y., 60, *infra.*)

The designation of lands required, the appointment of commissioners, and their report of the compensation to be made, vests no right, either in the company to the lands, or in the owners to the money awarded: and until an order of court is made, confirming the report, and directing the payment of the money, the proceeding may be set aside or abandoned. (*N. Y. Supr. Ct.*, 1850, *Hudson R. R. R. Co.* v. *Outwater*, 3 Sandf., 689.) The Supreme Court has no power to supervise or correct the proceedings of the commissioners of appraisal unless it is specially conferred by statute; and an order setting aside their proceedings is a nullity. (2 Hill 14, 159; 1 id., 10; 6 Johns., 1; 7 id., 541; 19 id., 39; 20 id., 269; 11 Wend., 154; *Supreme Ct.*, 1853; *Visscher* v. *Hudson R. R. R. Co.*, 15 Barb., 37; see 64 N. Y., 60, *infra.*)

In the case of *R. and S R. R. Co.* v. *Beckwith*, *supra* (see page 173, 10 How. Pr. R.), as to the power of the party opposing the confirmation of the report in the case then provided for has of spreading before the court all the facts in their power to furnish bearing upon the question of the truth of the report and the regularity of the proceedings of the commissioners. Mr. Crary, in volume 2 Sp. Pr., p. 224, says if it appears that the commissioners have been regular in their proceedings, and that due notice of the confirmation has been given, it is a matter of course to confirm the report (5 How. Pr., 177; 10 id., 168), and that no affidavit or other proof will be heard on the application to contradict or impeach the truth of the matters contained in it (*Id.*), and that the court will not, on such application, review or examine any error of law committed by the commissioners in their decisions of the merits or upon the admission or rejection of evidence. (*Id.*)

Where on an application to set aside the report of commissioners appointed to take lands for railroad purposes, it appeared that the commissioners had talked privately with a person from whom they had obtained information discrediting the testimony of the claimant, and that the award to him was greatly inadequate, and that his neglect to oppose the confirmation of the report arose from the neglect or misbehavior of his attorney, upon whom the notice of motion was served—*Held*, that the report was properly set aside. (*Matter of N. Y. C. and H. R. R. R. Co.*, 5 Hun, 105.)

The court at special term has power to vacate an order confirming the report of commissioners appointed to appraise the compensation for lands sought to be taken for railroad purposes, and thereupon to set aside the report and to appoint new commissioners; the owner is not confined to the remedy by appeal to the general term given by the general railroad act. (§§ 17, 19, chap. 140, Laws of 1850; *In re application N. Y. C., etc., R. R. Co.*, 64 N. Y., 60.) Such setting aside is in the discretion of the court. (*Idem.*) The report of the commissioners may be set aside for misconduct, palpable error or accident on the part of the commissioners, such as would authorize the setting aside of a verdict or the report of a referee. (*Idem.*) The above case is distinguished from *R. and S. R. R. Co.* v. *Davis* (43 N. Y., 137), and holds that what would excuse a default of a party and set aside an inquest or dismissal of a complaint at a circuit will empower the court to vacate the order of confirmation.

§ **144.** *Order confirming report to be filed, and effect of the order.*—A certified copy of the order so to be made as aforesaid shall be recorded at full length in the clerk's office of the county in which the land described in it is situated, and thereupon and on the payment or deposit by the company, of the sums to be paid as compensation for the land, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, with interest from the date thereof, the company shall be entitled to enter upon, take possession of and use the said land for the purposes of its corporation, during the continuance of its corporate existence, by virtue of this or any other act; and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate during the corporate existence of the company as aforesaid. If the company shall neglect to have such order recorded and to make the payment or deposit as herein provided, for the period of ten days after the date of such order, any party to such proceedings and interested therein may, at his election, cause a certified copy of the said order to be recorded, as aforesaid, and thereupon the moneys therein directed to be paid with interest thereon from the date of said order, shall be a debt against the company, and the same shall be a lien on such real estate and may be enforced and collected by action at law or in equity in the Supreme Court with costs, except nevertheless, the company abandon such proceedings by filing within thirty days, after notice in writing, of such re-

corded order, in the office of such clerk, a notice of its determination to do so, and paying the reasonable costs and expenses of such party to be ascertained and adjusted, on motion, by the court making such order. (*Laws* 1850, *chap.* 140, § 18, *as amended by Law* 1876, *chap.* 198, § 1.)

After the confirmation of the report of commissioners of appraisal appointed in proceedings instituted by a railroad corporation under the general railroad act to acquire lands for the purposes of its road, the corporation cannot, without leave of the court, abandon the proceedings and refuse to pay the award made to the owner. (*In re R. and C R. R. Co.*, 67 N. Y., 242.) The corporation compelled to file the papers, enter the order and pay the owner. (*Idem.*) When the commissioners have made their report of the compensation to which the owner is entitled, such owner may apply to the court for a confirmation of the report. (*In re B. and R., etc., R. R. Co.* v. *Calkins*, 62 N. Y., 386.) *In re N Y. C. R R. Co.* (67 N. Y., 242, *supra*), it was held that it was the right of the owner to have the papers filed and a precept awarded in case of default, under the amendment of the general railroad act (§ 5, chap. 282, Laws 1854). For said section 5, see § 154 of the text, *post*.

Before the passage of this section, payment or deposit of the money was not necessary before taking possession of the land. It was formerly decided (in *Bloodgood* v. *Mohawk and H. R. R. R. Co.*, 18 Wend., 9) that it was not necessary that damages and compensation should be actually paid, previous to the appropriation of the property. Where land is taken by a railroad company, the acceptance of a certificate of deposit, made by the cashier of a railroad, by the vendor of the land for the purchase money is not a waiver of his lien upon the land. (*Mims* v. *Macon and Western R. R.*, 3 Kelley, 333.)

The railroad company took possession of a narrow strip of land for the purposes of its road, and continued to exercise the right over the same for several years; it was *held*, on appeal, that this was *prima facie* evidence of the payment of the compensation awarded. (*Terry* v. *N. Y. Cent. R. R. Co.*, 22 Barb., 574.) Upon completion of the proceedings prescribed the company is authorized to "enter upon, take possession of and use the land for the purposes of its incorporation." It derives its title from the statute and not from the judgment of the court, and the court cannot give it possession by process. If the owner forcibly prevent the company from taking possession, the remedy is by action. (*Supreme Ct., Sp. T.*, 1853, *Niagara Falls and Lake Ontario R. R. Co.* v. *Hotchkiss*, 16 Barb., 270.)

Where a railroad company, upon an award of commissioners, have recorded the order and deposited the money as required by section 18 of the act of 1850, the title becomes wholly vested in the company and no longer remains in the former owner. Hence the company cannot, by changing the route of their road, as they are authorized to do by section 23, avoid paying such compensation on the ground that the premises are not necessary for them. (*Supreme Ct.* [*Sp. T.*, 1854], *Crooner* v. *Watertown and Rome R. R. Co.*, 9 How. Pr., 457.)

In regard to the nature of the title acquired by the corporation under these proceedings, it is now provided that the corporation may acquire the title in fee to any land which it may require for roadway and for necessary buildings, depots and freight grounds (*Laws* 1857, *chap.* 444, § 2; see § 118, *ante*), and that all lands acquired by appraisal for passenger and freight depots shall also be held in fee. (*Laws* 1854, *chap.* 282, § 118, *ante*.) In regard to the title and

nature of the estate, in lands acquired by the company in proceedings under the provisions of the general railroad act had prior to the passage of the above statutes, the following decisions were made that the company did not acquire any greater rights than the parties against whom they proceeded possessed (*Anderson* v. *Rochester, etc., R. R. Co.*, 9 How. Pr., 553), and that railroad companies under the general act do not acquire the same unqualified title, and right of disposition, to the real estate taken for the road and paid for according to the act, which individuals have in their lands; but the title to the land being limited to its use for the purposes of the railroad enterprise, it is subject to the exercise of all those powers reserved to the Legislature to which the franchises of the corporation are subject. (*Albany Northern R. R. Co.* v. *Brownell*, 24 N. Y., 345.)

In a pamphlet edition of the General Railroad Act, published by Mr. Bishop, at Rochester, in 1853, he has subjoined the following note: What estate does the railroad company acquire in the lands taken? This question has never been distinctly passed upon by our courts, in any of the reported cases.

By our statutes (1 R. S., 722, § 1), "Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance" It certainly is not an estate of inheritance, nor an estate for life. It appears the more like an estate for years; and, if so, it is only a chattel real, and subject to the incidents that govern that kind of estates, as to estovers, waste, etc., and questions may yet arise as to the rights of those corporations in opening mines, quarrying stone, etc., in which it may be necessary to decide whether this company take a fee or an estate less than a fee simple, during the time of the corporate existence. Some of the expressions in the section would seem to imply that it is a mere *easement.*

The Legislature of course have power to create estates different from those above mentioned, and perhaps our courts will decide that in this instance they are clothed with all the qualities of an absolute fee simple, during the life of the corporation. We will not indulge in speculation, but add a few decisions that throw some light on the subject.

The Court of Appeals, in the case of *Munger* v. *Tonawanda R. R. Co.* (4 Comst., 349), where the question was raised, do not distinctly pass upon it, but say, "It is immaterial whether or not the company were entitled to the site of their railway in fee simple. They had a clear right to the exclusive use of the land, while it was necessary for the enjoyment of their chartered privileges."

The above remarks should be confined to the cases of land taken by the companies prior to the passage of the acts above referred to, which authorize the taking of the land in fee. Lands conveyed to a railroad company will be presumed to have been acquired for its necessary uses, and, when no longer necessary, the corporation can convey in fee. (*Yates* v. *Van De Bogart*, 56 N. Y., 526.)

In *Heard et al.* v. *The City of Brooklyn*, 60 N. Y., 242, it was held that where a railroad corporation is authorized to acquire, by legal proceedings, only the use of the land for the purpose of operating its road, the fee remains in the owner subject to that use, and, on the discontinuance of the use, the owner is entitled to resume possession. The owner cannot be deprived of the reversionary interest by the act of the corporation, nor by legislation enactment, without compensation. In the above case the lands were appropriated by the company by proceedings taken in 1834, under chapter 256 of the laws of 1832—a

special act of incorporation—and became entitled only to the use of the land for operating their road. (But see *Laws* 1854, *chap.* 282, § 4; § 125, *ante.*) that all real estate acquired by any railroad corporation under and in pursuance of the provisions of this act shall be deemed to be acquired for public use.

The original section 18 of the Laws of 1850, chapter 140, previous to the amendment was as follows: A certified copy of the order so to be made as aforesaid, shall be recorded at full length in the clerk's office of the county in which the land described in it is situated; and thereupon, and on the payment or deposit by the company of the sums to be paid as compensation for the land, and for costs, expenses and counsel fees as aforesaid, and as directed by said order, the company shall be entitled to enter upon, take possession of, and use the said land for the purpose of its incorporation, during the continuance of its corporate existence, by virtue of this or any other act; and all persons who have been made parties to the proceedings shall be divested and barred of all right, estate and interest in such real estate, during the corporate existence of the company as aforesaid. All real estate acquired by any company under and pursuant to the provisions of this act, for the purposes of its incorporation, shall be deemed to be acquired for public use. Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventeenth section of this act, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal and report of the commissioners. Such appeal shall be heard by the Supreme Court at any general or special term thereof, on such notice thereof being given, according to the rules and practice of said court. On the hearing of such appeal, the court may direct a new appraisal before the same or new commissioners in its discretion; the second report shall be final and conclusive on all the parties interested. If the amount of the compensation to be made by the company is increased by the second report, the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited in the bank, as the court shall direct; and if the amount is diminished, the difference shall be refunded to the company by the party to whom the same may have been paid; and judgment therefor may be rendered by the court, on the filing of the second report, against the party liable to pay the same. Such appeal shall not affect the possession by such company of the land appraised; and when the same is made by others than the company, it shall not be heard, except on a stipulation of the party appealing not to disturb such possession.

§ **145.** *Renewing proceedings in case of abandonment by the company.*—But, in case of such abandonment, the company shall not renew proceedings to acquire title to such lands without a tender or deposit in court of the amount of said award and the interest thereon. (*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

§ **146.** *Real estate deemed acquired for public use.*—All real estate acquired by any company under and pursuant to the provisions of this act, for the purposes of its incorporation, shall be deemed to be acquired for public use.

(*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

As to how far railroads are public uses, *People, etc.*, v. *Batcheldor*, 53 N. Y., 128.

§ 147. *Either party may appeal.*—Within twenty days after the confirmation of the report of the commissioners, as provided for in the seventeenth section of this act, either party may appeal, by notice in writing to the other, to the Supreme Court, from the appraisal and report of the commissioners. (*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

The party deeming himself aggrieved by the decision of the commissioners, may bring the matter before the court by appeal. (*N. Y. and Erie R. R. Co.* v. *Corey*, 5 How. Pr., 117.) Where the report embraces several interests, any person interested and made a party, may appeal from such parts thereof as affect him. (*Troy and Rutland R. R. Co.* v. *Cleveland*, 6 How. Pr., 238.) An appeal will lie from the award of the commissioners, as well as from the proceedings to obtain such award. (*Troy and Boston R. R. Co.* v. *Northern Turnpike Co.*, 16 Barb., 100; *N. Y. and Erie R. R. Co.* v. *Corey*, 5 How. Pr., 177; *N. Y. and Erie R. R. Co.* v. *Coburn*, 6 id., 223; *Rochester, etc., R. R. Co.* v. *Budlong*, id., 467; *Rochester, etc., R. R. Co.* v. *Beckwith*, 10 id., 169; *Albany Northern R. R. Co.* v. *Cramer*, 7 id., 164.)

Where proceedings are taken by a railroad corporation to condemn various pieces of land belonging to different owners, all being described in one petition, and the case as to all is heard together, although separate orders are entered as to each owner, there is but one proceeding, and all the orders may be reviewed upon one appeal; so also when the orders are affirmed at general term, and separate orders of affirmance entered, costs for but one case are proper. (*In re P. P. and C. I. R. R. Co.*, 67 N. Y., 371.)

§ 148. *Appeal, where heard.*—Such appeal shall be heard by the Supreme Court at any general or special term thereof, on such notice thereof being given according to the rules and practice of said court. (*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

In the matter of the Matter of the N Y. Central R. R. v. *Marvin* (3 Ker., 276), it was held that an appeal did not lie to the Court of Appeals from an order of the Supemre Court, made at a general term, confirming the report of commissioners to appraise the compensation to be made for land taken under the general railroad act and refusing to make a new appraisal. The provision of the Code (§ 11, sub. 3, now § 190, Code of Civil Procedure), allowing an appeal from "a final order affecting a substantial right made in a special proceeding," must be taken as modified by the Laws of 1850, chapter 140, § 18. The whole proceeding is a special creation of the statute, entirely independent of the general provisions of the statute authorizing appeals to that court. (*Idem.*)

§ 149. *Proceedings on the appeal—second report to be final.*—On the hearing of such appeal the court may direct a

new appraisal, before the same or new commissioners in its discretion; the second report shall be final and conclusive on all the parties interested. (*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

(See notes to sections 141 and 143, *ante*, and 183, *post.*)

The language is not imperative, and a second appraisal cannot be claimed as a matter of right. (*N. Y. and Erie R. R. Co.* v. *Coburn*, 6 How. Pr., 223.) The above section, providing that the determination of the commissions in their second report shall be final and conclusive, bars both *certiorai* and appeal. (*People, etc., ex rel. Schuylerville, etc., R. R. Co.* v. *Betts*, 55 N. Y., 600.)

The provision of the general railroad act (§ 18, chap. 140, Laws 1850), making the decision of the Supreme Court final in the matter of appraisal of land taken for railroad purposes by proceedings *in invitum*, was not abrogated by the provisions of the act of 1854 (chap. 270, Laws of 1854) "in relation to special proceedings," authorizing an appeal from "a final order affecting a substantial right made in a special proceeding." This relates solely to the ordinary special judicial proceedings under the general provisions of the law regulating the practice of courts of justice. (*In re D. and H. Canal Co.*, 69 N. Y., 209.)

The court will not set aside the award except for substantial error. The commissioners are bound to be guided in their proceedings by the established rules of evidence, but a technical error in this respect will be disregarded; but otherwise, if the error be of such a character as to show that the commissioners have mistaken the principles that should govern their appraisal, and that the appellant may have been wronged by it. (*Supreme Ct.*, 1862, *Troy and Boston R. R. Co.* v. *Northern Turnpike Co.*, 16 Barb., 100; S. C., 1851, *Rochester and Syracuse R. R. Co.* v. *Budlong*, 6 How. Pr., 467; and see *Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169; *N. Y. Central R. R. Co.* v. *Marvin*, 11 N. Y. [1 Kern.], 276.)

On an appeal from an appraisement of compensation for land taken by a railroad company, the court will not interfere upon the ground that the amount of damages awarded was too small or too great, unless the evidence of injustice is palpable on its face. (*Supreme Ct.*, 1851, *Rochester and Syracuse R. R. Co.* v. *Budlong*, 6 How. Pr., 467.) On an appeal from the report under section 18 (Laws 1850), the court can only look at the matter contained in the report as the foundation of any order to be made upon appeal. The appeal is a review merely of the proceedings and decisions of the commissioners, and if they are erroneous or illegal, or if it appears that injustice has been done to the party appealing, a new appraisal will be ordered. No affidavits or further evidence will be received. (*N. Y. and Erie R. R. Co* v. *Corey*, 5 How. Pr., 177; *N. Y. and Erie R. R. Co.* v. *Coburn*, 6 How. Pr., 223.)

While a technical error will be disregarded, an appeal from the report of the commissioners will be set aside where proper evidence was offered by a party and rejected by the commissioners, which evidence, had it been admitted, might have led to a more favorable determination. (*Rochester and Syracuse R. R. Co.* v. *Budlong*, 6 How. Pr., 467.) If the court is satisfied that the commissioners have not erred in the principles of their appraisement, no other error will suffice to induce them to send the report back for review. (*Supreme Ct.*, 1852, *Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169.) A mere technical error cannot be allowed to affect the appraisal, unless it appears that such error has worked injustice to the party appealing. (*Troy and Boston R. R. Co.* v.

Northern Turnpike Co., 16 Barb., 100; *N. Y. Cent. R. R. Co.* v. *Marvin*, 1 Kern., 276; *Troy and Boston R. R. Co.* v. *Lee*, 13 Barb., 169.)

A railroad company, formed under a special charter in 1845, took proceedings under the provisions of the general act of 1850 to acquire lands. In several cases the same commissioners were appointed by the Supreme Court. Their report recited that they proceeded under the act of 1848 (which had then been repealed), and also showed they had proceeded to view the premises described in several cases at one time, and afterwards considered and examined each case separately. The report was confirmed at special term, and the order confirming it affirmed by the general term. The owners appeared before the commissioners and the court at each stage of the proceedings. *Held*, on appeal to the Court of Appeals, that no objections as to the irregularities having been taken below, they could not be raised there. (*Ct. of Appeals*, 1853, *Buffalo and N. Y. City R. R. Co.* v. *Brainard*, 9 N. Y. [5 Seld.], 100.) When the commissioners make their report under the section 16, on appeal under this section, no affidavits can be read on the view of such appeal; the court must act solely upon the report of the commissioners. (*N. Y. and Erie R. R. Co.* v. *Coburn*, 6 How. Pr. R., 223; also, 5 How. Pr. R., 181.)

§ 150. *Difference in amount of compensation on second report.*—If the amount of the compensation to be paid by the company is increased by the second report the difference shall be a lien on the land appraised, and shall be paid by the company to the parties entitled to the same, or shall be deposited in the bank, as the court shall direct; and if the amount is diminished the difference shall be refunded to the company by the party to whom the same may have been paid, and judgment therefor may be rendered by the court on the filing of the second report, against the party liable to pay the same. (*Laws* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

Where an increased compensation is awarded by the commissioners on a second appraisal, the company cannot avoid payment of the same on the ground that subsequently to the first appraisal the route of the road has been so changed that the said lands are no longer required for the track. (*Crowner* v. *Rome and Watertown R. R. Co.*, 9 How. Pr., 457.) Upon the consummation of the proceedings prescribed by the railroad act, all persons who have been made parties to the proceedings are divested and barred of their interest in such land, and have no longer a legal right to keep the company out of possession. (*Niagara Falls, etc., R. R. Co.* v. *Hotchkiss*, 16 Barb., 270.) It is a statutory conveyance of the land, wholly divesting the owner of his title and vesting it in the company, and the further provision in the same section, that if, on the second appraisal, the compensation is increased, the difference shall be a lien upon the land appraised, is but a recognition that the title to the premises taken becomes vested in the company. (*Crowner* v. *Rome and Watertown R. R. Co.*, 9 How. Pr., 457.)

§ 151. *Possession of company not to be disturbed by the appeal.*—Such appeal shall not affect the possession by such company of the land appraised, and when the same is

made by others than the company, it shall not be heard, except on a stipulation of the party appealing not to disturb such possession. (*Laws of* 1850, *chap.* 140, § 18, *as amended by Laws* 1876, *chap.* 198, § 1.)

§ **152.** *Power of court to amend defects and irregularities.*—The court shall also have power at any time to amend any defect or informality in any of the special proceedings authorized by this act, as may be necessary; or to cause new parties to be added, and to direct such further notices to be given, to any party in interest, as it deems proper; and also to appoint other commissioners in place of any who shall die, or refuse, or neglect to serve, or be incapable of serving. (*Laws* 1850, *chap.* 140, § 20.)

§ **153.** *Conflicting claims to compensation, how determined.*—If there are adverse and conflicting claimants to the money, or any part of it, to be paid as compensation for the real estate taken, the court may direct the money to be paid into the said court by the company, and may determine who is entitled to the same, and direct to whom the same shall be paid; and may, in its discretion, order a reference to ascertain the facts on which such determination and order are to be made. (*Laws* 1850, *chap.* 140, § 19.)

§ **154.** *Court empowered to carry proceedings into effect*—In all cases of appraisal under this act, and the act hereby amended [*Laws* 1850, *chap.* 140], where the mode or manner of conducting all or any of the proceedings to the appraisal, and the proceedings consequent thereon, are not expressly provided for by the statute, the courts before whom such proceedings may be pending shall have the power to make all the necessary orders, and give the proper directions to carry into effect the object and intent of this and the aforesaid act; and the practice in such cases shall conform, as near as may be, to the ordinary practice in such courts. (*Laws* 1854, *chap.* 282, § 5.)

It was heretofore held that should force be used to prevent the company from occupying the land, the persons so resisting are amenable to the law for their unlawful misconduct: but such a state of facts will not authorize the court, upon the application of the railroad company, to issue a writ of possession or assistance to enforce a right which it had never declared by its judgment, and which it had no authority to declare, the statute, not the court, has declared the rights of the parties. (*Niagara Falls, etc., R. R. Co.* v. *Hotchkiss*, 16 Barb., 270.) *It seems*, however, that such persons might be restrained by injunction from such interference. (*Id.*)

The above decision, however, was made in 1853, and it has since been held that under the above section 5 of chapter 282, Laws of 1854 (the text above),

that the Supreme Court has power to make an order or issue process to put a railroad company into possession of lands acquired by proceedings under the general railroad act. (*Matter of N. Y. C. and H. R. R. R. Co.*, 60 N. Y., 116.)

§ 155. *Proceedings to acquire additional real estate and to correct defective title.*—If, at any time after an attempt to acquire title by appraisal of damages or otherwise, it shall be found that the title thereby attempted to be acquired is defective, the company may proceed anew to acquire or perfect such title, in the same manner as if no appraisal had been made; and at any stage of such new proceedings, the court may authorize the corporation, if in possession, to continue in possession, and, if not in possession, to take possession, and to use such real estate during the pendency and until the final conclusion of such new proceedings; and may stay all actions or proceedings against the company on account thereof, on such company paying into court a sufficient sum, or giving security, as the court may direct, to pay the compensation therefor when finally ascertained; and in every such case the party interested in such real estate may conduct the proceedings to a conclusion, if the company delays or omits to prosecute the same. (*Laws* 1850, *chap.* 140, § 21.)

See the next section for an addition to the above original section of the general railroad act.

This section applies to cases where the title is attempted to be procured by agreement and purchase, as well as to those cases where it is attempted to be procured by appraisal. (*Matter of the N. Y. Central R. R. Co.*, 20 Barb., 419.) Where a railroad company takes the title of a piece of land for their road under and in pursuance of the statute on making due compensation for its value, upon which there is a prior mortgage of which the company had constructive notice, and upon which land the company had erected valuable improvements, they have a right to redeem their lands from the lien of the mortgage on the payment of a ratable proportion of the mortgage debt, which they must do to the full value of the property at the time of the appropriation, with interest, irrespective of the improvements put thereon by the company. (*Dows* v. *Owners of the C. and N. Falls R. R. Co.*, 16 How., 571.) The fact that a railroad corporation has constructed and commenced operating its road, in reliance upon a title subsequently found to be defective, is no objection to proceedings on its part to perfect its title to lands so occupied under the provision of the general railroad act (§ 21, chap. 140, Laws 1850), authorizing railroad corporations to perfect defective titles. (*In re P. P. and C. I. R. R. Co.*, 67 N. Y., 371.)

§ 156. *Proceedings to correct defective title to real estate and right of way, and to acquire additional real estate and right to convey water, etc.*—Section twenty-one 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, is hereby amended by adding

thereto the following: "And if at any time after the construction of any railroad operated by steam by any company now existing, or that may hereafter be created, such company, or any company owning, operating or leasing such railroad, or any mortgagee or mortgagees in possession of such railroad, or person or persons appointed by any court of competent authority as receiver or receivers of any such railroad and in the possession of and operating the same, shall require, for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned, leased or possessed as aforesaid, any real estate in addition to what has been already acquired for the purposes of such railroad, or shall require any further right to lands, or the use of lands, for switches, turnouts, or for filling any structures of or for constructing, widening or completing therewith or thereon any embankments or the roadbed of such railroad, when thereby greater safety or permanency may be secured, and such lands shall be contiguous to such railroad and reasonably accessible to the place where the same are to be used for such purpose or purposes, or for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, or for any other purpose necessary to the operation of such railroad; or any right to take and convey water from any spring, pond, creek or river to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts, or pipes for the purpose of conveying such water, and to take up, relay and repair the same; or any right of way required for carrying away or diverting any waters, streams or floods from such railroad, for the purpose of protecting the same, or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring or damaging the property of any person or parties who may be rendered liable to injury by reason of such embankment, excavation or structure, as the same may have been constructed previous to such time, or may then exist; such company, or mortgagee or mortgagees, person or persons in possession as aforesaid, may acquire such additional real estate, or any property or real estate which they now use or occupy, or right of way or other rights hereinbefore specified, by purchasing the same of the person or parties owning the same or interested therein, or to be affected thereby, and by paying to such parties such damages as they may sustain by reason thereof, if the amount of such compensation or damages can be agreed upon between such company, or mortgagee or mortgagees, person or persons in possession, and such owner or owners or parties interested in such additional real estate; and if

such company, or mortgagee or mortgagees, person or persons in possession shall, for any cause, be unable to agree for the purchase of such real estate or right of way, or other rights, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain or if the title to any such real estate or right of way, or other rights already acquired or attempted to be acquired, shall, for any cause, prove defective or imperfect, then, and in every such case, such company, or mortgagee or mortgagees, person or persons in possession of and operating as aforesaid any such railroad, may proceed to acquire or perfect title to such real estate or right of way, or other rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed. Nothing in this act contained shall authorize the taking of any waters that shall at the time of such taking be commonly used for domestic, agricultural or manufacturing purposes to such an extent as to injuriously interfere with such use in the future." And nothing in this act contained shall authorize any railroad corporation to acquire any such gravel lands not contiguous to its right of way, nor shall it be lawful for any railroad company or any company herein named to take or acquire, other than by mutual agreement, any right or easement in or to any lands or real estate owned or occupied by any other railroad corporation, excepting the right to intersect or cross the tracks and lands owned or held for right of way by such other company, such intersection and crossing to be limited to points where the same can be made without appropriating or affecting any lands owned or held for depots or gravel beds; provided that the mortgagee or mortgagees, receiver or receivers, in possession of any railroad as aforesaid, before commencing proceedings to ascertain and appraise damages under the provisions of this act, shall present a petition to the court under whose authority they are acting, or to any court of competent authority, for permission to commence such proceedings, which petition shall set forth that such real estate, right of way, or other rights as aforesaid, described in said petition, are necessary for the operation of said railroad, or for the protection of the property in their possession; and a copy of which petition, with a notice of the time and place the same will be presented to said court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to said court, and no proceedings to ascertain and appraise damages as aforesaid shall be taken by said mortgagee or mortgagees, receiver or receivers as aforesaid unless they shall be duly authorized

by order of said court. (*Laws* 1850, *chap.* 140, § 21; *amended by Laws* 1869, *chap.* 237, § 1; *amended by Laws* 1877, *chap.* 224, § 1; *amended by Laws* 1881, *chap.* 649, § 1.)

(See notes to § 117, *ante.*)

The existence of a mortgage which is a lien upon land taken and used by a railroad company for the purposes of constructing and operating its road, is a defect in the title, within the meaning of section 21 of the act of 1850, authorizing the company to proceed anew in such case. (*Supreme Ct.*, 1854, *Matter of N. Y. C. R. R. Co.*, 20 Barb., 419.)

Previous legislation.

The following is the legislation previous to the section given in the text:

And if, at any time after the construction of any railroad operated by steam by any company now existing, or that may hereafter be created, such company, or any company owning, operating or leasing such railroad, shall require for the purposes of its incorporation or for the purpose of running or operating any railroad so owned or leased by such company, any real estate in addition to what it has already acquired, or shall acquire any further right to lands or the use of lands for switches, turnouts, or for the flow of water occasioned by railroad embankments or structures now in use or hereafter rendered necessary, or for any other purpose necessary to the operation of such railroad; or any right to take and convey water from any spring, pond, creek or river, to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts or pipes for the purpose of conveying such water, and to take up, relay and repair the same; or any right of way required for carrying away or diverting any waters, streams or floods from such railroad, for the purpose of protecting the same, or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring or damaging the property of any person or parties who may be rendered liable to injury by reason of such embankment, excavation or structure, as the same may have been constructed previous to such time, or may then exist; such company may acquire such additional real estate, or any property or real estate which they now use or occupy, or right of way, or other rights hereinbefore specified, by purchasing the same of the person or parties owning the same or interested therein, or to be affected thereby, and by paying to such parties such damages as they may sustain by reason thereof, if the amount of such compensation or damages can be agreed upon between such company and such person or parties; and if such company shall, for any cause, be unable to agree for the purchase of such real estate or right of way, or other rights, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or right of way, or other rights already acquired or attempted to be acquired, shall, for any cause, prove defective or imperfect, then, and in every such case, such company may proceed to acquire or perfect title to such real estate or right of way, or other rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed. Nothing in this act contained shall authorize the taking of any waters that shall at the time of such taking be commonly used for domestic, agricultural or manufacturing purposes, to such an extent as to injuriously interfere with such use in the future. (*Laws of* 1850, *chap.* 140, § 21, *as amended by Laws* 1869, *chap.* 237, § 1. See *Matter of N. Y. C., etc., R. R. Co.,*

5 Hun, 86; *id.*, 4 id., 381; *N. Y. and Canada R. R. Co.* v. *Gunnison*, 3 T. & C., 632; S. C., 1 Hun, 496; *Matter of N. Y. C., etc., R. R. Co.* v. *Kep*, 46 N. Y., 546; *Railroad Co.* v. *Davis*, 43 id., 137; *N. Y. C., etc., R. R. Co.* v. *Metropolitan Gaslight Co.*, 5 Hun, 201; *Arnold* v. *H. R. Railroad Co.*, 55 N. Y., 661; *Syracuse, etc., Railroad Co., matter of*, 4 Hun, 311; *Matter of Rondout, etc., Railroad Co.*, 5 Lans., 298; *N. Y. C., etc., Railroad* v. *Sweeney*, 6 T. & C., 669.)

And if at any time after the construction of any railroad operated by steam by any company now existing, or that may hereafter be created, such company, or any company owning, operating or leasing such railroad, or any mortgagee or mortgagees in possession of such railroad, or person or persons appointed by any court of competent authority as receiver or receivers of any such railroad and in the possession of and operating the same, shall require, for the purposes of its incorporation, or for the purpose of running or operating any railroad so owned, leased or possessed as aforesaid, any real estate in addition to what has been already acquired for the purposes of such railroad, or shall require any further right to lands, or the use of lands, for switches, turnouts, or for the flow of water occasioned by railroad embankments or structures now in use, or hereafter rendered necessary, or for any other purpose necessary to the operation of such railroad; or any right to take and convey water from any spring, pond, creek or river, to such railroad, for the uses and purposes thereof, together with the right to build or lay aqueducts, or pipes for the purposes of conveying such water, and to take up, relay and repair the same; or any right of way required for carrying away or diverting any waters, streams or floods from such railroad, for the purpose of protecting the same, or for the purpose of preventing any embankment, excavation or structure of such railroad from injuring or damaging the property of any person or parties who may be rendered liable to injury by reason of such embankment, excavation or structure, as the same may have been constructed previous to such time, or may then exist; such company, or mortgagee or mortgagees, person or persons in possession as aforesaid, may acquire such additional real estate, or any property or real estate which they now use or occupy, or right of way or other rights hereinbefore specified, by purchasing the same of the person or parties owning the same or interested therein, or to be affected thereby, and by paying to such parties such damages as they may sustain by reason thereof, if the amount of such compensation or damages can be agreed upon between such company, or mortgagee or mortgagees, person or persons in possession, and such owner or owners or parties interested in such additional real estate; and if such company, or mortgagee or mortgagees, person or persons in possession shall, for any cause, be unable to agree for the purchase of such real estate or right of way, or other rights, or shall be unable to agree upon the sum which shall be paid to such persons or parties in satisfaction of the damages they may sustain, or if the title to any such real estate or right of way, or other rights already acquired or attempted to be acquired, shall, for any cause, prove defective or imperfect, then, and in every such case, such company, or mortgagee or mortgagees, person or persons in possession of and operating as aforesaid any such railroad, may proceed to acquire or perfect title to such real estate or right of way, or other rights, and to ascertain and appraise such damages in the manner and by the proceedings hereinbefore in this act prescribed. Nothing in this act contained shall authorize the taking of any waters that shall at the time of such taking be commonly used for domestic, agricultural or manufac-

turing purposes to such an extent as to injuriously interfere with such use in the future." Provided that the mortgagee or mortgagees, receiver or receivers, in possession of any railroad as aforesaid, before commencing proceedings to ascertain and appraise damages under the provisions of this act, shall present a petition to the court under whose authority they are acting, or to any court of competent authority, for permission to commence such proceedings, which petition shall set forth that such real estate, right of way, or other rights as aforesaid, described in said petition, are necessary for the operation of said railroad, or for the protection of the property in their possession; and a copy of which petition, with a notice of the time and place the same will be presented to said court, must be served on all persons whose interests are to be affected by the proceedings at least ten days prior to the presentation of the same to said court, and no proceedings to ascertain and appraise damages as aforesaid shall be taken by said mortgagee or mortgagees, receiver or receivers as aforesaid, unless they shall be duly authorized by order of said court. (*Laws* 1877, *chap.* 224.)

§ **157.** *Legislation prior to general railroad act to acquire title to lands upon change of route of roads.*—Any railroad company, the route of whose railroad or of some part thereof shall have been located in the manner prescribed by law, may change any part of such route so located, on which its railroad shall not have been constructed, but no such change shall vary the route of such railroad to exceed one mile laterally from the route which shall have been so located; and the new location of any portion of such route when so changed shall be made in the same manner, as nearly as may be, as the first location was required by law to be made. When any portion of such route shall be so changed, such company may take and hold such lands for the construction of its railroad over such portion of its route as it would have been authorized by law to take and hold for that purpose if such portion of its route had originally been located as it shall be by such change; and when the owner of any such lands shall from any cause be incapable of selling the same, or if such company cannot agree with such owner for the purchase thereof, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, such company may acquire the title to such lands in the manner prescribed by the twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth sections of chapter two hundred and ten of the laws of eighteen hundred and forty-seven. (*Laws* 1847, *chap.* 404, § 1.)

Chapter 210 of the Laws of 1847 mentioned in the preceding act relates to the incorporation of plank-roads and the corporation of turnpikes. It was subsequently amended by chapter 397 of the Laws of 1847.

§ **158.** *How title to land acquired prior to the general railroad act in cases where company could not agree with owner.*—Every railroad company chartered in this State or authorized to construct any portion of its railroad therein, when the owner of any lands which it shall be authorized by the law of the State to take for the construction of its railroad shall from any cause be incapable of selling the same, or if such company cannot agree with such owner for the purchase thereof, or if after diligent search and inquiry the name and residence of such owner cannot be ascertained, may acquire the title of such owner to any such lands in the manner prescribed by the sections of chapter two hundred and ten of the laws of eighteen hundred and forty-seven which are specified in the first section of this act. (*Laws* 1847, *chap.* 404, § 2.)

See note to section *ante*, chapter 210 of the Laws of 1847, prescribing the manner in which plank-road and turnpike companies might acquire lands under like circumstances, for the purposes of their incorporation. That act was amended by Laws 1847, chapter 398.

§ **157.** *How land acquired under last two sections to be held by the company.*—When the title to any lands shall be acquired by any railroad company pursuant to the provisions of this act,* such company shall hold the same in the same manner which it is required by law to hold lands acquired for the construction of its railroad. (*Laws* 1847, *chap.* 404, § 3.)

See the last two sections of the text.

§ **160.** *Provisions previous to general railroad act to enable companies to acquire valid title to lands in cases of defective title.*—In any case where a railroad shall not have acquired a valid and sufficient title to any land upon which they have constructed their tracks, or where the title to any such lands has been or shall hereafter be rendered invalid by reason of any mortgage, judgment or other lien, affecting the same, then such company in either case is authorized to obtain and acquire title to the said land, by purchase of the persons, bodies corporate or politic owning the same, or having an interest therein, if such purchase can be effected by agreement between the owners thereof and such company: but if not, such company shall have the power to cause compensation to be made therefor, and for that purpose they shall present a petition to a court of record in the county in which such land may lie, setting forth the failure of such title, and the manner in which such failure occurred, and the name and residence of the owner or claimants, and

* Laws 1847, chap. 404, §§ 1, 2.

praying for the drawing of a jury to determine the compensation to be made therefor. The said court of record shall thereupon direct notice to be given in writing to the owners or claimants of such lands, of the time and place of the drawing of such jury, which drawing shall be in the county in which such lands are situated, and upon proof of the service of such notice and hearing, the parties who may attend such court of record shall cause such jury to be drawn in such manner and at such place as it shall direct; said court shall cause the said jury to be sworn; and shall prescribe the time and place of the meeting of said jury, and the notices to be given to the owners or claimants, of the proceedings before said jury. The said jury shall view the premises for which compensation is to be made, and shall, without fear, favor, or partiality, determine the compensation to be made for said land, the title to which shall have become invalid or insufficient as aforesaid, and may hear and examine witnesses on oath in relation to the same. The said jury shall make an inquisition of their appraisement or assessment, and shall cause the same to be filed in the office of the clerk of the county in which such land is situated. Upon proof to the court within thirty days after the filing of the inquisition of the jury, of payment to the owner or claimant, or of depositing to his or their credit in such bank as the said court shall direct, of the amount of such appraisement, and of all the cost and expenses attending it, including reasonable counsel fees (to be taxed and certified by said court) the said court shall make an order describing the land and reciting the assessment or appraisement thereof, and the mode of making it, which order shall be recorded in the office of the clerk of the county in which the land is situated, in like manner as if the same were a deed of conveyance, and such railroad company or corporation shall thereupon become possessed of such land during the continuance of the corporation, and may use the same for the purposes of such corporation. This provision shall not be construed to change or impair the duties or obligations of such corporation in regard to fencing said land, or making and maintaining crossing places over said road as prescribed in their charter; but nothing herein contained shall be construed to impair or affect the right of any individual to recover the costs and expenses of any legal proceedings commenced prior to the passage of this act, or to recover such sum for the use of any land occupied by such corporation as he or she is entitled to by law. (*Laws* 1847, *chap.* 272, § 3.)

§ **161.** *Special estates in land; title to, how acquired.*— Whenever there shall be one or more of the estates enumer-

ated in article one of title two of chapter one of the second part of the Revised Statutes, entitled "Of the creation and division of estates," in any land required by any railroad company for the purpose of its incorporation, such company may acquire such estate and land by means of the special proceedings authorized by the act hereby amended.* In every such case the railroad company, in addition to the statements now required by said act, shall set forth and state in its petition the facts in relation to any such estate, and the person, persons or class of persons, then in being or not in being, who are or may become entitled, in any contintingency, to any estate as aforesaid in such land, and may pray that such estate may be acquired, and such persons may be bound by the said proceedings; and thereupon the court to whom such petition is presented, if there be no attorney appearing in their behalf shall appoint some competent and disinterested attorney or officer of the court to appear in such proceedings and represent the rights, interests and estate of the person, persons, or class of persons aforesaid in any such land, and to protect the same, on the appraisal and proceedings aforesaid; and it shall be the duty of the court, on or after the confirmation of the report of appraisal, to ascertain by such report, or by a reference for that purpose, or otherwise, in its discretion, the rights, interests and estates of such person, persons or class of persons, in the land so appraised, and in the compensation awarded therefor, and to make an order determining the amount or share of such compensation to which such person, persons or class of persons are or may become entitled on account of such estate, as the same shall arise or become vested in them respectively, and to direct, and to provide for the payment, investment or securing thereof, for the benefit of the person, persons or class of persons aforesaid, who are, or may in the contingency upon which such estate arises, become entitled thereto; upon the company paying or securing such amount or share, in the manner directed by such order of the court, it shall be deemed to have acquired, and shall be vested with the estate which such person, persons or class of persons have, or may be entitled to in said land, and they shall be barred of and from all right or claim in and to such land. (*Laws* 1857, *chap.* 444, § 2.)

The estates referred to in the above mentioned article of the Revised Statutes are: estates of inheritance, estates for life, estates for years, and estates at will and by sufferance. Section five of the same article provides that estates of inheritance and for life, shall be denominated estates of freehold; estates for years shall be chattels real; and estates at will or by sufferance shall be chattel

* Chap. 140, Laws 1850.

interests, but shall not be liable as such to sale on execution. Section seven classifies estates as respects the time of their enjoyment, into estates in possession and estates in expectancy.

§ **162.** *Trustee not authorized to sell; proceedings to acquire title to land.*—In case any title or interest in real estate, required by any company formed under this act for the purpose of its incorporation, shall be vested in any trustee not authorized to sell, release and convey the same, or in any infant, idiot or person of unsound mind, the Supreme Court shall have power, by a summary proceeding on petition, to authorize and empower such trustee, or the general guardian or committee of such infant, idiot or person of unsound mind, to sell and convey the same to such company, for the purposes of its incorporation, on such terms as may be just, and in case any such infant, idiot, or person of unsound mind has no general guardian or committee, the said court may appoint a special guardian or committee for the purpose of making such sale, release or conveyance, and may require such security from such general or special guardian or committee, as said court may deem proper. But before any conveyance or release authorized by this section shall be executed, the terms on which the same is to be executed, shall be reported to the court, on oath, and if the court is satisfied that such terms are just to the party interested in such real estate, the court shall confirm the report and direct the proper conveyance or release to be executed, which shall have the same effect as if executed by an owner of said land, having legal power to sell and convey the same. (*Laws* 1850, *chap.* 140, § 26.)

A railroad company by proceeding under section 14 of the general act to acquire lands, obtain no greater right than the parties against whom they proceed possessed. To acquire a right to use a public square or place for any purpose inconsistent with the object of its dedication, they should proceed under section 26—which provides for cases of lands held in trust. (*Supreme Ct*, 1854, *Anderson* v. *Rochester, etc., R. R. Co.*, 9 How. Pr., 553.) That the power given by the general railroad act to take property which is already held and dedicated by authority of law to a different public use; *e. g.*, a park (see *Matter of Boston and Albany R. R. Co.*, 53 N. Y., 574). The above section of the statute is for the benefit of the trustee and infant, or idiot owner, and is not compulsory upon the railroad company. (*Matter of New York Bridge Co.*, 4 Hun, 635.)

The Supreme Court has power to order the sale of the real estate of infants, under certain restrictions; but this section undoubtedly authorizes the exercise of that power in every case where the land is necessary for a railroad. The court has no inherent original jurisdiction to direct the sale of such property, and is derived entirely from statute; and the exercise of this power must be pursued strictly according to the statute. (*Cochran* v. *Sudley*, 20 Wend., 365; *Rogers* v. *Dill*, 6 Hill, 415.)

§ **163.** *United States, certain lands, title to not affected by railroad privileges.*—Any right, title or privilege heretofore granted, or which may be granted by the United (*sic*) authorities to any railroad company to cross or occupy any portion of the fortification grounds in the city of Oswego, for road tracks or any railroad purpose connected therewith, shall not impair or invalidate any of the rights, titles or privileges given to the United States by an act entitled "An act to cede the jurisdiction of certain lands near the mouth of the Oswego river, New York, to the United States," passed April 25, 1839. (*Laws* 1870, *chap.* 70, § 1.)

CHAPTER 11.

OF THE PRELIMINARY SURVEY—MAP AND PROFILE OF PROPOSED ROUTE AND OF OTHER MAPS AND PROFILES, AND OF ALTERATIONS OF THE PROPOSED ROUTE OF THE ROAD.

§ 164. Preliminary survey.
§ 165. Map and profile of proposed route to be made and filed.
§ 166. Notice to occupants of land.
§ 167. Notice and petition by owner of land aggrieved by location of proposed route.
§ 168. Contents of petition and map of proposed alteration.
§ 169. Commissioners appointed to examine proposed route and alteration.
§ 170. When route shall be altered.
§ 171. Determination of commissioners to be filed.
§ 172. Appeal from decision of the commissioners.
§ 173. Hearing on the appeal.
§ 174. Fees of the commissioners.
§ 175. Map and profile of the constructed road.
§ 176. Maps and profiles to be filed in the office of the state engineer and surveyor.
§ 177. Map and profile of altered roads.
§ 178. When maps and profile to be filed in the register's office.
§ 179. Maps, etc., to be filed upon the construction of railroad near or across canal.
§ 180. Maps to be filed upon change of grade of track crossing canal.
§ 181. Statutes in regard to maps, etc., passed previous to the general railroad act.

§ 164. *Preliminary survey.*—Every corporation formed under this act (the general railroad act), shall have power 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. (*Laws* 1850, *chap.* 140, § 28, *subd.* 1; *as re-enacted by Laws* 1880, *chap.* 133, § 2.)

In *Holly* v. *Saratoga R. R. Co.*, 9 Barb., 458, the question was raised whether a law which authorizes an entering upon another man's land for the purpose of making the preliminary or final surveys for a railroad before compensation is made is constitutional, when the act makes suitable provision for compensation in case the land is subsequently taken therefor. The court said this question has been repeatedly settled by the highest courts of the State in favor of the constitutionality of the act. It was directly involved in the leading case of

Rodgers v. *Bradshaw*, 20 Johns., 735–744, and the right to enter for such purpose was upheld by the unanimous opinion of the Court of Errors. The same doctrine was repeated with approbation by Walworth, Ch. J., in *Bloodgood* v. *The Mohawk and Hudson R. R.* (18 Wend., 17.) Unless the Legislature possesses power to authorize an entering for this purpose, the clause of the constitution which, by implication, permits private property to be taken for public use, upon making just compensation, would be nugatory. The constitution does not prohibit the Legislature from permitting an entry to be made upon the property of an individual for the purpose of a preliminary examination. The prohibition relates only to the *taking it for public use* without just compensation.

§ **165.** *Map and profile of proposed route to be made and filed.*—Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made, or in the office of the register in counties where there is a register's office. (*Laws* 1850, *chap.* 140, § 22, *amended by chap.* 560, § 1, *Laws of* 1871, by adding the words "or in the office of the register in counties where there is a register."

A map of a railroad, professing to be a map only of a portion thereof, filed by the company in a county clerk's office, cannot restrict the company to the construction of only so much of the road as is marked out upon such map, when the articles of association require it to be extended further. (*Supreme Ct.*, 1861, *Mason* v. *Brooklyn and Newtown R. R. Co.*, 35 Barb., 373.) Even if the company has treated such map as the whole road, yet the articles of association are superior to it and cannot be controlled by it. (*Id.*)

§ **166.** *Notice to occupants of land.*—The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company, of the time and place such map and profile were filed, and that the route designated thereby passes over the land of such occupant. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

Where in a proceeding under the general railroad act, as amended by the laws of 1871, on the petition of a land owner for the appointment of commissioners to change the location of the route of a railroad as surveyed by the company, it appears by the testimony before the commissioners that the petitioner has failed to comply with the directions of the statute by giving notice of the application for the appointment of commissioners to an individual whose land, if the line of the railway be changed as proposed by the petitioner, will be crossed and af-

fected thereby, such proceeding is wholly void and will be reversed on appeal from the commissioners. (*Norton* v. *Walkill Valley R. R. Co.*, 63 Barb., 77.)

§ **167.** *Notice and petition by owner of land aggrieved by location of proposed route.*—Any occupant or owner of land over which such route passes, feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, give ten days' notice, in writing, to such company and to the owners or occupants of lands to be affected by any proposed alteration, of the time and place of an application to a justice of the Supreme Court in the judicial district where said lands are situated, by petition duly verified, for the appointment of commissioners to examine the said route. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **168.** *Contents of petition and map of proposed alteration.*—Such petition shall set forth the petitioner's objections to the route designated by the company, shall designate the route to which it is proposed to alter the same, and shall be accompanied by a survey, map and profile of the route as designated by the company and of the proposed alteration thereof, copies of which petition, map, survey and profile shall be served upon the company and said owners or occupants, with the notice of application. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **169.** *Commissioners appointed to examine proposed route and alteration.*—If the said justice shall consider sufficient cause therefor to exist, he may, after hearing such parties as shall appear, appoint three disinterested persons, one of whom must be a practical civil engineer, commissioners to examine the route proposed by the company and the route to which it is proposed to alter the same, and, after hearing the parties, to affirm the route originally designated, or adopt the proposed alteration thereof, as may be consistent with the just rights of all parties and the public, including the owners or occupants of lands upon the proposed alteration. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

Where commissioners are appointed under the provisions of this section, their power over the proposed route is not restricted to that part of it which lies within the bounds of the lands of the party procuring their appointment, but they may make any alteration of the proposed route within the county which may be necessary to obviate such objections of the party aggrieved as they may deem well-founded; and in exercising their power to alter the proposed route, it is the duty of the commissioners to complete the alteration so as to preserve the continuity of the line. They have no power to change a portion of the proposed route so as to leave it disconnected at either end with the

other portion, and thus abridge or interrupt the road. (*People ex rel. Erie and Genesee Valley R. R. Co.* v. *Tubbs*, 49 N. Y., 356.) The statute contemplates but one board of commissioners in a county, and all alterations to be made in the proposed route in such county should be made by that board. It should therefore complete its work by either affirming the route proposed by the company or making all necessary alterations, and when this is done the route through the county is established. (*Id.*)

§ **170.** *When route shall not be altered.*—But no alteration of the route shall be made except by the concurrence of the commissioner who is a practical civil engineer, nor shall an alteration be made which shall cause greater damage or injury to lands, or materially greater length of road, than the route designated by the company would cause, nor which shall substantially change the general line adopted by the company. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **171.** *Determination of commissioners to be filed.*—The determination of the commissioners shall, within thirty days after their appointment, be made and certified by them, and the certificate, with the petition, map, survey and profile, and any testimony taken before them, be filed in the office of the register of the county, in counties where there is a register, otherwise in that of the county clerk. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **172.** *Appeal from decision of commissioners.*—Within twenty days after the filing of such certificate any party may, by notice in writing to the others, appeal to the Supreme Court from the decision of the commissioners, which appeal shall be heard and decided at the next general term of the court held in any judicial district in which the lands of the petitioners or any of them are situated, for which the same can be noticed according to the rules and practice of said court. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **173.** *Hearing on the appeal.*—On the hearing of such appeal the court may affirm the route proposed by the company or may adopt that proposed by the petitioner. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

§ **174.** *Fees of the commissioners.*—Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment; and, if the route of the road as

designated by the company is altered by the commissioners, and their decision is affirmed on appeal (if an appeal be taken), the company shall refund to the applicant the amount so paid. (*Laws* 1850, *chap.* 140, § 22, *as amended by Laws* 1871, *chap.* 560, § 1.)

The original section 22 of the Laws of 1850, previous to the amendment of 1871, was as follows: Every company formed under this act, before constructing any part of their road into or through any county named in their articles of association, shall make a map and profile of the route intended to be adopted by such company in such county, which shall be certified by the president and engineer of the company, or a majority of the directors, and filed in the office of the clerk of the county in which the road is to be made. The company shall give written notice to all actual occupants of the land over which the route of the road is so designated, and which has not been purchased by or given to the company, of the route so designated. Any party feeling aggrieved by the proposed location, may, within fifteen days after receiving written notice as aforesaid, apply to a justice of the Supreme Court, out of court, by petition, duly verified, setting forth his objections to the route designated; and the said justice may, if he considers sufficient cause therefor to exist, appoint three disinterested persons, one of whom must be a practical engineer, commissioners to examine the proposed route, and, after hearing the parties, to affirm or alter the same, as may be consistent with the just rights of all parties and the public; but no alteration of the route shall be made, except by the concurrence of the commissioner who is a practical civil engineer. The determination of the commissioners shall, within thirty days after their appointment, be made and certified by them, and the certificate filed in the office of the county clerk. Said commissioners shall each be entitled to three dollars per day for their expenses and services, to be paid by the person who applied for their appointment; and if the proposed route of the road is altered or changed by the commissioners, the company shall refund to the applicant the amount so paid.

§ **175.** *Map and profile of constructed road.*—Every corporation shall, within a reasonable time after their road shall be constructed, cause to be made:

A map and profile thereof, and of the land taken or obtained for the use thereof, and file the same in the office of the state engineer and surveyor; and also like maps of the parts thereof located in different counties, and file the same in the offices for recording deeds in the county in which such parts of said road shall be. Every such map shall be drawn on a scale, and on paper, to be designated by the state engineer and surveyor, and certified and signed by the president or engineer of such corporation. (*Laws* 1850, *chap.* 140, § 45.)

§ **176.** *Maps and profiles, to be filed in office of state engineer and surveyor.*—It shall also be the duty of each corporation to transmit to the state engineer and surveyor the following maps, profiles and drawings exhibiting the

characteristics of their roads; the map to show the length and direction of each straight line, and the length and radius of each curve; also the point of crossing of each town and county line, and the length of line in each town and county accurately determined by measurements to be taken after the completion of the road. The profile to be on the map, and shall show the grade line and surface of ground in the usual method, also the elevation of grades above tides at each change in the inclination thereof. The maps and profile to be made on a scale of five hundred feet to one-tenth of a foot; vertical scale of profile to be one hundred feet to one-tenth of a foot. For all roads or parts of roads now done, or in operation, and for which such maps and profiles have not already been returned, they shall be returned on or before the first day of January next; and for all roads now in progress, or which may hereafter be constructed, the said maps and profile shall be returned within three months after the same or any portion thereof shall be in use. (*Laws* 1850, *chap.* 140, § 31, *subd.* 183, *as amended by Laws of* 1880, *chap.* 575, § 1.)

§ **177.** *Map and profile of altered road.*—The directors of every company formed under this act may, by a vote of two-thirds of their whole number, at any time alter or change the route or any part of the route of their road or its termini, or locate the said route or any part thereof in a county adjoining any county named in the articles of association, if it shall appear to them that the line can be improved thereby, and they shall make and file in the clerk's office of the proper county a survey, map and certificate of such alteration or change. (*Laws* 1850, *chap.* 140, § 23, *as amended by* § 1 *of chap.* 77 *of the Laws of* 1876.)

§ **178.** *When map and profile to be filed in the register's office.*—Whenever in said act* any map, survey, profile, certificate or other paper is directed to be filed or recorded in the office of the county clerk, the same shall be filed or recorded in the office of the register of the county, provided there be a register's office in said county, and all maps, profiles, surveys, reports, certificates or other papers which have, pursuant to the provisions of said act, been heretofore filed or recorded in the office of the clerk of any county in which there is a register, shall be, within thirty days after the passage of this act, transferred to the office of such register, and shall be by him refiled or recorded as of the date of the original filing or record. (*Laws* 1871, *chap.* 560, § 3.)

* Chap. 140, Laws of 1850.

This act indicates that there should be a refiling or recording in the register's office, of all maps, profiles, surveys, reports, certificates and other papers, which had been previously filed or recorded in a county clerk's office, pursuant to the act of 1850.

§ **179.** *Maps, etc., to be filed upon the construction of railroad near or across canal.*—The canal commissioners are hereby invested with a general and supervisory power over so much of any railroad as passes over any canal or feeder belonging to this State, or approaches within ten rods of such canal or feeder, so far as such power may be necessary to preserve the free and perfect use of the canals or feeders of this State, and necessary for making any repairs, improvements or alterations in the same; and said company shall not construct their railroad over or at any place within ten rods of any canal or feeder belonging to this State, unless said company shall lay before the commissioners aforesaid, a map, plan and profile, as well of the canal or feeder as of the route designated for their railroad, exhibiting distinctly and accurately the relations of each to the other, at all the places within the limits of ten rods as aforesaid; and shall thereupon obtain the written permission of said canal commissioners, with such conditions, instructions and limitations as, in the judgment of said canal commissioners, the free and perfect use of any such canal or feeder may require. (*Laws* 1834, *chap.* 276, § 17.)

§ **180.** *Maps to be filed upon change of grade of track crossing canal.*—The directors of any railroad company whose track crosses any of the canals of this State, and the present grade thereof shall be raised in consequence of directions given by the canal commissioners, may, with the assent of the said canal commissioners, lay out a new line of road for the purpose of crossing such canal on a more favorable grade, and may extend such new line and connect the same with any other line of road owned by the same company, and a survey, map and certificate of such new or altered line shall be made and filed in the clerk's office of the proper county. (*Laws* 1854, *chap.* 282, § 17.)

The survey, map and certificate should be filed in the register's office of the county, if there be one; if not, then in the county clerk's. (*Laws* 1871, *chap.* 560, § 3.)

§ **181.** *Statutes in regard to maps, etc., passed previous to the general railroad act.*—Every railroad, canal and bridge company incorporated by this State, shall cause to be deposited with the comptroller, in the canal room, accurate drawings of the plans and specifications of the mechani-

cal work hereafter to be constructed by such company, to be drawn on a scale and on paper to be designated by the board of canal commissioners, or by such other board of public works as may hereafter be organized by the Legislature. (*Laws* 1838, *chap.* 161, § 1.*) Every such company shall cause to be deposited, in like manner, a map and profile of every canal, railroad or bridge hereafter to be constructed by them, drawn on a scale, and on paper of a size and form, to be in like manner designated. (*Laws* 1838, *chap.* 161, § 2.) The surveyor general is hereby authorized and required to collect and preserve all maps, plans and drawings, levels and surveys of every description, made and to be made, for the use of the State. (*Laws* 1840, *chap.* 259, § 1.) Every canal company and every railroad company in this State, to whom the credit of the State may have been loaned, or which may hereafter ask the aid of the State, shall, so far as may be in their power, without making a new survey, furnish to the surveyor general copies of all maps, plans, drawings, levels and surveys of every description, which may be made in connection with the construction of their canal or railroad. (*Laws* 1840, *chap.* 259, § 2.)

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1 Robt., 405.

CHAPTER 12.

OF THE CONSTRUCTION OF THE ROAD.

§ 182. Railroad buildings for accommodation and use of passengers and freight.
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§ 199. Width of the road.
§ 200. Companies may construct line of narrow guage.
§ 201. Weight of rail to be used.
§ 202. Weight of rail to be used, act of 1847.
§ 203. Sign boards at railroad crossings.
§ 204. Railroad fences, cattle-guards and farm crossings to be erected and maintained.
§ 205. Provision as to fences and cattle-guards extended to all railroads.
§ 206. Agreement by owner of land to maintain fences.
§ 207. Lessees of railroads to maintain fences.

§ 182. *Railroad buildings for accommodation and use of passengers and freight.*—Every corporation formed under this act [General railroad act, Laws 1850, chap. 140] shall have power to erect and maintain all necessary and convenient buildings, stations, fixtures and machinery for the accommodation and use of their passengers, freights and business. (*Laws* 1850, *chap.* 140, § 28, *sub.* 8, *re-enacted by chap.* 133, *Laws of* 1880.)

See section *ante*, 118, that all lands acquired by any railroad company by appraisal, for passenger and freight depots, shall be held by such company in fee. (*Laws* 1854, *chap.* 282, § 17.)

A court of equity will not grant an injunction to restrain the construction of a public work, such a railroad made under authority of an act of the Legislature, on the ground that the plaintiff will sustain indirect or consequential

damages by the construction, where his property is not taken or appropriated. (Citing cases, *Supreme Ct., Sp. T.*, 1866, *Barnes* v. *South Side R. R. Co.*, 2 Abb. Pr. [N. S.], 415.) The temporary inconvenience to which any person is exposed by the construction of a railroad, in the absence of negligence or unskillfulness, is a case of *damnum absque injuria*. (*Plant* v. *Long Island R. R. Co.*, 10 Barb., 26; *Adams* v. *Saratoga, etc., R. R. Co.*, 11 id., 414.)

§ 183. *Railroad may be constructed across, along or upon highways, etc* —Every corporation formed under this act * shall have power to construct their road across, along or upon any stream or 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 said 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 commissioners of highways of the town in which said highway is situated. (*Laws* 1850, *chap.* 140, § 28, *sub.* 5, *am'd Laws* 1864, *chap.* 582, § 1, *as re-enacted by chap.* 133, *Laws of* 1880.)

(See notes to sections 141 *et* 149, *ante*.)

Highways and streets.

The dedication of land to the use of the public as a highway, does not preclude the owner of the fee, subject to the public easement, from maintaining an action against a railroad company, which, without his consent, or an appraisal of his damages, enters upon and occupies such highway with the track of its road. (*Williams* v. *N. Y. Cent. R. R Co.*, 16 N. Y., 97.) Such an appropriation of the highway by the railroad company is the imposition of an additional burden upon, and a taking of the property of, the owner in fee within the meaning of the constitutional provision, which forbids such taking without

* Laws 1850, chap. 140.

compensation. The company can, therefore, derive no title under acts of the Legislature, and the license or consent to a use inconsistent with the public easement of the municipal or other authorities who represent the public as to such right, without the consent of the owner of the fee, or the appraisal and payment of his damages, in the mode prescribed by law. (*Id.*; see, also, *Trustees* v. *Auburn R. R. Co.*, 3 Hill, 567; *People* v. *Law*, 34 N. Y., 49; *Craig* v. *Rochester R. R. Co.*, 39 id., 494.) In *Wager* v. *Troy Union R. R. Co.*, 23 N. Y., 526, there was a reiteration of the decisions in *Williams* v. *N. Y. Cent. R. R. Co.* (16 N. Y., 97, *supra*), *Carpenter* v. *Oswego and Syracuse R. R Co.* (24 id., 656), and *Mahon* v. *N. Y. Cent. R. R. Co.* (id., 658), that the use of the street for a railroad is a new burden beyond the public easement, which cannot be imposed by legislative authority without compensation to the owner of the fee. That such use, without acquiring the title of the owner of the fee or his license, is a continuing trespass, and that he may maintain ejectment to recover the land, subject to the public easement as a highway. (See, also, *Lozier* v. *N. Y. Cent. R. R. Co.*, 42 Barb., 465, that the owner of the fee may maintain ejectment against the company, subject to the public easement.) The inference of the common law is, that the owners of the land adjoining a public highway are the owners of the fee of the highway, and that the public merely have an easement over the same (See the *Wager case, supra*; also, *Bissell* v. *N. Y. Cent. R. R. Co.*, 23 id., 61; *Adams* v. *Saratoga, etc., R. R. Co.*, 11 Barb., 414; *People* v. *Law*, 34 id., 494; *Wetmore* v. *Same*, id., 515.) Where a turnpike company transferred its road to a railroad company, *held*, that in transferring it, the turnpike in fact abandoned its road, and although it was authorized by the Legislature to transfer it to the railroad company, this could not constitutionally deprive the original owners of the land of their right of reversion without compensation. (*Mahon* v. *N. Y. Cent. R. R. Co.*, 24 N. Y., 668. In *Fletcher* v. *Auburn and Syracuse R. R. Co.*, 25 Wend., 462, it was held that the charter of a railroad company authorizing them to occupy a highway in laying the track, relates only to the public property in the road, and protects them from indictment for a public nuisance, without affecting their liability to adjacent owners for damages. This case was followed, 1843, *Mahon* v. *Utica and Schenectady R. R. Co.*, Hill & D. Supp., 156; 1858 [citing, also, 21 Conn., 294; 16 N. Y., 97; 3 Hill, 567], *Robinson* v. *N. Y. and Erie R. R. Co.*, 27 Barb., 512.

In *Chapman* v. *Albany and Susq. R. R. Co.*, 10 Barb., 366, it is said to be regarded as standing upon somewhat questionable ground. It seems to be affirmed in *Brown* v. *Cayuga and Susq. R. R. Co.*, 12 N. Y., 486; but this statement is explained in *Bellinger* v. *N. Y. C. R. R. Co.*, 23 N. Y., 42–52, and considered to be overruled in 4 N. Y., 195; but compare *Corey* v. *Buffalo, Corning and N. Y. R. R. Co.*, 23 Barb., 482, where it is said to be overruled by *Radcliff* v. *Mayor, etc., of Brooklyn*, 4 N. Y. [4 Comst.], 195, and *Gould* v. *Hudson River R. R. Co.*, 6 N. Y. [2 Seld.], 522.

A provision in the charter of a railroad company authorizing them to construct their track upon and across a highway, is not to be construed as intended to authorize them to appropriate the interest of the owner of the fee. (*Supreme Ct.*, 1842, *Presbyterian Society in Waterloo* v. *Auburn and Rochester R. R. Co.*, 3 Hill, 567; and see *Fletcher* v. *Auburn and Syracuse R. R. Co.*, 25 Wend., 462.) As to whether the company can acquire the fee to such lands by adverse possession (see *Craig* v. *Rochester, etc., R. R. Co.*, 39 Barb., 503; Smith, J., and also *Watson* v. *N. Y. Cent. R. R. Co.*, 6 Abb. Pr. [N. S.], 91). The rule seems

to be different in the city of New York from that stated in the Williams case. The fee of the streets in that city are under the unqualified control of the Legislature, and any appropriation of them to a public use by Legislative authority is not a taking of private property so as to require compensation to the city to render it constitutional. (*People* v. *Kerr*, 27 N. Y., 188.) It should appear that the wrongful occupation is wholly inconsistent with the public easement. *Adams* v. *Saratoga and Washington R. R. Co.*, 11 Barb., 414.)

Since the act of 1851 (*Laws of* 1851, *chap.* 19, § 4), railroad companies have no right to enter upon a turnpike or plank-road without the consent of the owners, except upon the condition of first paying the damages sustained by the turnpike or plank-road company, after the same shall have been ascertained under the statute. (*Supreme Ct.*, 1855, *Ellicottville, etc., Plank-road Co.* v. *Buffalo, etc., R. R. Co.*, 20 Barb., 644.) To allow a street in a city to be used for a railroad track, either upon its natural surface, or by tunneling, is not a misappropriation of it, provided such use does not interfere with the free and unobstructed use of it by the public, as a highway for passage and repassage. The temporary inconvenience to which the adjoining proprietors are exposed by the construction of the work does not entitle them to damages. Where the land of individuals is taken for a street in a city, and compensation is made for it, the city has the right to appropriate the land so taken to all such legitimate uses and servitudes as custom and the public good require that a street should be appropriated, without making further compensation. (*Supreme Ct.*, 1850. *Plant* v. *Long Island R. R. Co.*, 10 Barb., 26; S. C., 9 N. Y. Leg. Obs., 53; see also *Adams* v. *Saratoga, etc., R. R. Co.*, 11 Barb., 414.) To similar effect, in case of damages occasioned by a change of grade of a street for the same purpose (1851, *Chapman* v. *Albany and Schenectady R. R. Co.*, 10 Barb., 360). Injury to individual owners of land by the authorized construction of a railroad through a street, the title to which is in the people of the State, is *damnum absque injuria*, and gives them no right of action against the company. (4 N. Y., 195; 6 id., 522; *Supreme Ct.*, 1856, *Corey* v. *Buffalo, Corning and N. Y. R. R. Co.*, 23 Barb., 482.) A railroad company is not relieved from the duty imposed on it by the general railroad act (sub. 5, § 28, chap. 140, Laws 1850) to restore a highway intersected by its road "to such state as not unnecessarily to have impaired its usefulness," by the fact that a street railway company whose road runs along the highway is obligated to keep the highway between the rails of its track in repair. (*Masterson* v. *N. Y. C. R. R. Co.*, 84 N. Y., 247.)

The following is taken from the opinion in the case of the *Trustees, etc., of Waterloo* v. *Auburn and Rochester R. R. Co.* (3 Hill, 567), which is cited with approbation in *Williams* v. *N. Y. Central R. R. Co.*, *supra*, as being the first in order of time as well as of importance in the class of cases enunciating the doctrine which is supported by the Williams and Wagner cases, *supra*. The plaintiff sued the company for digging up the soil, etc , and defendants insisted that it was in a highway, and that by the power conferred in charter they had a right to construct their road upon and across any highway, etc.:

By the court, Nelson, Ch. J. The seventh section of the act incorporating the Auburn and Rochester railroad company (Session Laws of 1836, pp. 493, 496) provides that the company shall acquire a right to the land necessary for the construction of their road, before entering upon the same, either by gift, purchase, or, in case of refusal to sell, etc., by an assessment of the value of

the land, etc. By the eleventh section (id., p. 499) it is declared, that whenever it shall be necessary, etc., to intersect or cross any stream of water or water-courses, or any road or highway, etc., it shall be lawful for the company to construct their road across or upon the same; but they shall restore the stream or water-course or the road or highway thus intersected, to its former state of usefulness, etc.

The plea is founded upon the supposition that this section afforded full authority to the defendants to lay out and construct the track of their road over the highway in question, without first making any compensation therefor. So far as the public interest therein is concerned, the supposition is doubtless well founded. But the plaintiffs were not divested of the fee of the land by the laying out of the highway; nor did the public thus acquire any greater interest therein than a right of way, with the powers and privileges incident to that right; such as digging the soil and using the timber and other materials found within the limits of the road, in a reasonable manner, for the purpose of making and repairing the same. Subject to this easement, and this only, the rights and interest of the owner of the fee remained unimpaired. (*Sir John Lade* v. *Shepherd*, 2 Str., 1004; *The Mayor, etc., of Northampton* v. *Ward*, 1 Wils., 110, 111; *Perley* v. *Chandler*, 6 Mass. R., 454; *Harrison* v. *Parker*, 6 East, 154; *Jackson* v. *Hathaway*, 15 John. R., 447; *Gidney* v. *Earl*, 12 Wend., 98.)

It is quite clear, therefore, even if the true construction of the eleventh section accords with the view taken by the counsel for the defendants, that the Legislature had no power to authorize the company to enter upon and appropriate the land in question for purposes other than those to which it had been originally dedicated in pursuance of the highway act, without first providing a just compensation therefor. (*Bloodgood* v *The Mohawk and Hudson R. R. Co.*, 18 Wend., 9; *Fletcher* v. *The Auburn and Syracuse R. R. Co.*, 25 id., 462, 464.) But we apprehend the provision, upon a true construction, applies only to the public property and interest in the highway, and was not intended to authorize the company to appropriate to themselves any estate or interest remaining in the owner of the fee. This was the view entertained of a similar provision in the charter of the Auburn and Syracuse railroad company (25 Wend., 462), though it was then unnecessary to express an opinion upon the point now before us.

It was said on the argument that the highway is only used by the defendants for the purposes originally designed—the accommodation of the public; and for this, compensation has already been made. This argument might have been used with about the same force in the case of *Sir John Lade* v. *Shepherd*, before cited. There, the only act of trespass was the laying of a plank across a ditch, with one end resting upon a highway running over the plaintiff's land. The defendant had land lying contiguous to the road, and used the plank as a bridge. The court held, that the plaintiff had not parted with the property of the road, and that, for all purposes except the right of passage by the public, it was still the plaintiff's soil; that the right claimed was an easement to the defendant, and if he would have it, he must agree with the plaintiff for it (see 1 Wils., 111). So here, the claim set up is an easement; not a right of passage to the public, but to the company, who have the exclusive privilege of using the track of the road in their own peculiar manner. The public may travel with them over the track, if they choose to ride in their cars; but, nevertheless, the company are not the public, nor can they be regarded as standing in the place

of the public. They are a private company, an ideal individual, and stand, in respect to the claim set up, on the footing of the defendant in the case just referred to. (For a full review of authorities on this question, see vol. 2 Smith's Leading Cases, 6th Amer. ed., p. 232, original p. 216; and *Adams* v. *R. and S. R. R. Co.*, 11 Barb., 451, 452, 453. The reversal of the *Adams Case* in 10 N. Y., 328, was upon other grounds.)

Streams and bridges.

A corporation which diverts a stream from its natural channel is bound to restore it, and preserve it in its former state as nearly as possible, if requisite to secure the interests of the owner's of land upon such stream. (*Ct. of Appeals*, 1867, *Cott* v. *Lewiston R. R. Co.*, 36 N. Y., 214; 34 How. Pr., 222.) The fifth clause of section 28 of the general railroad act—which requires companies interfering with waters to restore the stream to its former state, etc.,—not only requires the company in the first instance to make the channel as perfect as practicable, but to continue and preserve it in that state as long as they continue to divert the water from its natural channel. (*Id.*) As to construction of provisions in the charter of the Hudson River Railroad Company, regarding crossings of bays, etc., see *Tillotson* v. *Hudson R. R. R. Co.*, 9 N. Y., 575; *Getty* v. *Same*, 21 Barb., 617; *Furniss* v. *Same*, 5 Sandf., 551.

It is true that by subdivision 5, of section 28, of the general railroad act, a railroad company is empowered to construct its railroad across, along, or upon any stream of water, water-course, street, highway, plank-road, turnpike or canal, which the route of its road shall intersect or touch; but this provision grants only the right which the public had in such water-courses, roads, etc., and does not grant any right to violate private property without the consent of the owners. (25 Wend., 462; 3 Hill, 567; 5 id., 170; *Supreme Ct.*, 1855, *Ellicottville, etc., Plank-road Co.* v. *Buffalo, etc., R. R. Co.*, 20 Barb., 644.) A grant to a railroad company to cross a river with its track, and to transport passengers and property thereon in the ordinary course of its business, is not an infringement on the exclusive privileges conferred on a toll-bridge company, by a prior grant, of erecting a toll-bridge across such river. (*Mohawk Bridge Co.* v. *Utica and Schenectady R. R. Co.*, 6 Paige, 554.)

A railroad company, authorized by its charter to take lands necessary for its purposes, and whose route crosses a stream, may purchase a private bridge within such limits, if it will answer the corporate ends; but they will take it subject to the restrictions in respect to allowing free passage over it, to the injury of a neighboring toll-bridge, under which the private owners held it. (*A. V. Chan. Ct.*, 1846, *Thompson* v. *N. Y. and Harlem R. R. Co.*, 3 Sandf. Ch., 625.) A railroad corporation has a right to erect a bridge upon piers, for the purpose of carrying their railways across a navigable river, between the places prescribed for the commencement and termination of the road; subject to the condition prescribed in the charter, that the usefulness of the stream should not be impaired thereby. (*Supreme Ct.*, 1836, *People* v. *Rensselaer and Saratoga R. R. Co.*, 15 Wend., 113; *Chancery*, 1837; *Weaver* v. *Rensselaer and Saratoga R. R. Co.*, cited in *Mohawk Bridge Co.* v. *Utica and Schenectady R. R. Co.*, 6 Paige, 554, 561.)

A railroad company organized under the general railroad act of 1850 (*Laws of* 1850, *chap.* 140) is required, in crossing a highway, to restore the highway to its former state, or to such state as not unnecessarily to impair its usefulness. And where it becomes necessary, in thus crossing a highway, that a bridge

should be built over the railroad to restore the highway to its usefulness, the company are bound to build the bridge and continue it in repair, as long as the highway exists, and the corporation is allowed to enjoy the lawful exercise of its franchise. (*Supreme Ct., Sp. T.*, 1869, *People ex rel. Town of Schaghticoke* v. *Troy and Boston R. R. Co.*, 37 How. Pr., 427.)

The mere abandonment of the railroad and the removal of its track, and its entire disuse, is not enough to deprive the railroad company of the privileges of its franchise, or to absolve it from maintaining and keeping in repair such bridge. The company cannot incur a forfeiture at its own pleasure and in disregard of the rights of others (24 N. Y., 261). (*Id.*)

In an action against a railroad company, to recover damages for injuries to the plaintiff's land arising from the overflowing of a stream, caused by the acts of the defendant, it appeared that the defendant had, in constructing its road, excavated and removed the banks of the natural stream, in order to conform the ground to the grade of the railroad. *Held*, that it was proper to charge that if the jury should find, from the evidence, that the injury and damage to the plaintiff was occasioned by such excavation and removal, and that but for such excavation and removal the injury and damage would not have occurred, the defendant was liable. The authority given to railroad companies by the general act, to cross streets, etc., does not exempt them from liability for all damage caused; and negligence or want of skill is immaterial. (*Supreme Ct.*, 1858, *Robinson* v. *N. Y. and Erie R. R. Co.*, 27 Barb., 512.) Negligence or want of skill in the defendants is not material in an action against a railroad company for damages incurred by reason of their having interfered with a highway. (*Id.*; see, also, *Brown* v. *Cayuga and Susquehanna R. R. Co.*, 12 N. Y., 486.) An injunction will not be granted to restrain the company from erecting a wooden bridge for the purpose of carrying the highway over its track, and to compel it, instead, to construct a stone culvert or arch, for such purpose. (*Bancus* v. *Albany Northern R. R. Co.*, 8 How. Pr., 70.)

A railroad company constructed their road across a highway, injuring the highway and neglecting to restore it. *Held*, in an action by the commissioners of highways, that they were not liable both to damages, under section 28 of the general railroad act (*Laws of* 1850, 224), requiring crossings to be constructed without injury to the road—and also to treble damages under 1 R. S., 526, § 130—respecting injuries to highways. (*Supreme Ct., Sp. T.*, 1853, *Sipperly* v. *Troy and Boston R. R. Co.*, 9 How. Pr., 83.)

The Hudson river being a navigable stream, in which the tide ebbs and flows, the land upon its banks below ordinary high water-mark belongs to the people of the State in their sovereign capacity. (*Gould* v. *The Hudson R. R. R. Co.*, 12 Barb., 616.) And where the defendants under and in pursuance of a charter from the Legislature, authorizing them to construct a railroad from New York to Albany, entered upon the Hudson river in front of plaintiff's farm, and between the ordinary height and ordinary low water-mark, raised and constructed a line of solid embankment across the whole river front of said farm, about five feet in height above the ordinary high water-mark, and forming a barrier to the passage of vessels, boats, etc., through the same, and laid a railroad track upon such embankment, and ran their cars thereon without the consent or permission of the plaintiff, and without making or offering him any compensation for the damages sustained by him. *Held*, that the Legislature had not transcended its authority in making the grant to the defendants; that the defend-

ants were authorized to do the acts complained of, and that the plaintiff had not sustained any injury for which an action would lie. (*Id.*)

Under a charter providing that whenever it shall be necessary to intersect or cross any stream of water or water-course, or any road or highway, it shall be lawful for the corporation to construct their road across or upon the same, but in such a way as not to impair its usefulness, the railroad company are liable for damage to plaintiff's lands situated on a stream, occasioned by an overflow of water, caused by the construction of the road over the stream, and through its banks. (16 Ad. & El., 643; *Ct. of Appeals*, 1855, *Brown* v. *Cayuga and Susquehanna R. R. Co.*, 12 N. Y. [2 Kern.], 486.) Remedy under the charter of the Hudson River Railroad Company for one whose access to the river has been cut off without compensation or restoring it. (*N. Y. Superior Ct.*, 1852, *Furniss* v. *Hudson R. R. R. Co.*, 5 Sandf., 551.)

§ **184.** *Railroad crossings and intersections, how made.* —Every corporation formed under this act* shall have power 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 turn-outs, sidings and switches and other conveniences in furtherance of the objects of its connection. 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 line or lines, the grade or grades, points and manner of such crossing 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 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, 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, 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, merchandise and other property received at and forwarded from the same point for individual and other corporations. Nothing in this act contained shall apply to any street surface railroad

* Laws 1850, chap. 140.

in the city of New York. (*Laws* 1850, *chap.* 140, § 28, *subd.* 6, *as amended by chap.* 350, *Laws* 1872; *as amended by Laws* 1880, *chap.* 133, § 2; *as amended by Laws* 1880, *chap.* 583, §§ 1, 2.)

A commission appointed to ascertain and determine the points and manner of crossing by one railroad of another has no power to locate the crossing at any other place than that stated in the petition and order, nor to review any fact on which the order was based, nor to question the right of the petitioner to a crossing, nor has such commission power to regulate the rate of speed at which trains on the intersecting roads shall pass the crossing. (*Matter of Central R. R. of L. I.*, 1 Sup. R. [T. &. C.], 419.)

Petition, verified by consulting engineer, not a jurisdictional question. (*In re B., H. T. and W. R. R. Co.*, 79 N. Y., 64.) Allegation of inability to agree in petition, not denied by the answer, no proof necessary. (*Idem.*) Proof of allegations of petition not in issue not required. (*Idem.*) The act authorizes more than one crossing. (*Idem.*) Points of crossing not necessarily fixed by notice of location of new road. (*Idem.*) See also 79 N. Y., 697, as to rights of companies in similar cases.

In proceedings under sub. 6, § 28, chapter 140, Laws 1850 (the general railroad act), by one railroad corporation to acquire the right "to cross, intersect, join and unite" its railroad with that of another corporation, the petition should state that the petitioner is a corporation, that the route of its road as laid down crosses the track of the other road, that it desires to cross or intersect such road, and that "the two corporations cannot agree upon the amount of compensation therefor, or the points and manner of such crossing and intersection." It is not necessary to state the modes required by said act (§ 14) where the proceeding is to acquire title to lands. The reference to the provisions of the act in respect to acquiring title is simply to regulate the mode of appointing commissioners. (*In re L. and B. R. R. Co.*, 77 N. Y., 557.) Where the petition contains such unnecessary statements and they are put in issue by the answer, the issues thus formed are immaterial and may be disregarded by the court. (*Idem.*) But where the answer denies the allegations of the petition of a failure of the two corporations to agree, the burden is upon the petitioner of proving the facts thus put in issue, and without such proof the prayer of the petition cannot be granted. (*Idem.*) The petition in such proceedings stated that the petitioner desired to "cross and intersect" the road of defendant, that it had applied in good faith but had been unable to agree upon the amount of compensation "or the points and manner of such crossing and intersction." The answer denied that the petitioner had applied for the right "to intersect or unite" with the defendant's road, or had offered to negotiate, attempted to agree as to compensation, or made any offer. The petitioner on the hearing gave no proof of the facts so alleged, the defendant offered to prove the allegations of its answer which the court refused to allow, and upon the petition and answer made an order appointing commissioners. *Held* error; that the averments of the answer put in issue said allegations of the petition as the petition showed, but the crossing required and contemplated was one on the same level with defendant's road, *i. e.* an intersection. (*In re L. and R. R. R. Co.*, 77 N. Y., 557.)

The original section of the general railroad act was as follows:

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. (*Laws* 1850, *chap.* 140, § 28, *sub.* 6.)

The amendment of 1872 was as follows: Paragraph six of section twenty-eight 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, is hereby amended 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, 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 points for individuals and other corporations. (*Laws* 1872, *chap.* 350, § 1.)

§ 185. *Construction of railroad near or across canal.*—The canal commissioners are hereby invested with a general and supervisory power over so much of any railroad as passes over any canal or feeder belonging to this State, or approaches within ten rods of such canal or feeder, so far as such power may be necessary to preserve the free and perfect use of the canals or feeders of this State, and necessary for making any repairs, improvements or alterations in the same; and said company shall not construct their railroad over or at any place within ten rods of any canal or feeder belonging to this State, unless said company shall lay before the commissioners aforesaid, a map, plan and profile, as well of the canal or feeder as of the route designated for their railroad, exhibiting distinctly and accurately the relations of each to the other, at all the places within the limits of ten rods as aforesaid; and shall thereupon obtain the written permission of said canal commissioners, with such conditions, instructions and limitations as in the judgment of said canal commissioners the free and perfect use of such canal or feeder may require. (*Laws* 1834, *chap.* 276, § 17.)

§ 186. *Canal, etc., when directors may change grade of railroad.*—The directors of any railroad company whose track crosses any of the canals of this State, and the present grade thereof shall be raised in consequence of direc-

tions given by the canal commissioners, may, with the assent of the said canal commissioners, lay out a new line of road for the purpose of crossing such canal on a more favorable grade, and may extend such new line and connect the same with any other line of road owned by the same company, and a survey, map and certificate of such new or altered line shall be made and filed in the clerk's office of the proper county; and such company shall have the same right and power to acquire title to any lands required for the purposes of such company, under the provisions of this section, as it would have in the location of a line of road in the first instance; and all the provisions of the act hereby amended, relative to acquiring title to land for railroad purposes, shall apply to such new or altered line; and all lands acquired by any railroad company by appraisal, for passenger and freight depots, shall be held by such company in fee; but no new line or route of road can be laid out and established, as contemplated in this section, in any city or village, unless the same be sanctioned by a vote of two-thirds of the common council of said city, or trustees of said village, nor shall any railroad company be compelled to abandon any existing line of road in consequence of establishing such new line of road. (*Laws* 1854, *chap.* 282, § 17.)

See section 178, *ante*, that the survey, map and certificate should be filed in the register's office, if there be one; if not, then in the county clerk's office.

§ **187.** *The same.*—Whenever the grade of any railroad shall be changed under the direction of the canal comissioners, at any point where such road crosses or shall cross any canal or canal feeder, except in the city of Buffalo, it shall be lawful for the directors of the company owning such railroads to alter the grade of such road, on each, or either side of the place where such change shall have been so made by order of the canal commissioners, for such distance and in such manner as the said directors may deem necessary. And the directors of any railroad company shall also be authorized at any time, to change the grade of any part of their road except in the city of Buffalo, in such manner as they may deem necessary to avoid accidents, and to facilitate the use of such road; any and all damages arising from such alteration to be appraised in same manner as provided in the act entitled "An act to authorize the formation of railroad corporations, and to regulate the same;" and in the several acts amendatory thereof. (*Laws* 1855, *chap.* 478, § 1.)

§ **188.** *Streets and highways, how laid out across railroad tracks.*—It shall be lawful for the authorities of any

city, village or town in this State, who are by law empowered to lay out streets and highways, to lay out any street or highway across the track of any railroad now laid or which may hereafter be laid, without compensation to the corporation owning such railroad; but no such street or highway shall be actually open for use until thirty days after notice of such laying out has been served personally upon the president, vice-president, treasurer or a director of such corporation. (*Laws* 1853, *chap.* 62, § 1.)

It shall be the duty of any railroad corporation, across whose track a street or highway shall be laid out as aforesaid, immediately after the service of said notice, to cause the said street or highway to be taken across their track, as shall be most convenient and useful for public travel, and to cause all necessary embankments, excavations and other work to be done on their road for that purpose; and all the provisions of the act, passed April second, eighteen hundred and fifty, in relation to crossing streets and highways, already laid out, by railroads, and in relation to cattle-guards and other securities and facilities for crossing such roads, shall apply to streets and highways hereafter laid out. (*Laws* 1853, *chap.* 62, § 2.)

If any railroad corporation shall neglect or refuse, for thirty days after the service of the notice aforesaid, to cause the necessary work to be done and completed, and improvements made on such streets or highways across their road, they shall forfeit and pay the sum of twenty dollars for every subsequent day's neglect or refusal, to be recovered by the officers laying out such street or highway, to be expended on the same; but the time for doing said work may be extended, not to exceed thirty days, by the county judge of the county in which such street or highway, or any part thereof, may be situated, if, in his opinion, the said work cannot be performed within the time limited by this act. (*Laws* 1853, *chap.* 62, § 3.)

A highway cannot be laid out over grounds acquired by a railroad corporation for the site of an engine house, etc., necessary for its use at a station. (*Albany Northern R. R. Co.* v. *Brownell*, 24 N. Y., 345.) It is not a violation of the constitutional provisions against taking private property for public use, in authorizing the town authorities to lay out a highway across the tracks of a railroad, without making compensation to the company. (*Idem*; overruling *Miller* v. *N. Y. and Erie R. Co.*, 21 Barb., 513.) Nor is it unconstitutional to require the railroad company to make the necessary excavations or embankments for taking the highway across the railroad. (*Idem.*) It is the duty of a railroad corporation, both under the general railroad act and upon common law principles, to keep its road at a crossing in safe condition, so that a traveler upon the highway, exercising ordinary care, can pass over the same in safety. (*Gale* v. *N. Y. C. R. R. Co.*, 76 N. Y., 594.)

§ **189.** *Highway may be carried over or under the railroad track.*—Whenever the track of a railroad constructed by a company formed under this act shall cross a railroad, a highway, turnpike, or plank-road, such highway, turnpike or plank-road may be carried under or over the track, as may be found most expedient; and in cases where an embankment or cutting shall make a change in the line of such highway, turnpike or plank-road desirable, with a view to a more easy ascent or descent, the said company may take such additional lands for the construction of such road, highway, turnpike or plank-road on such new line as may be deemed requisite by the directors. Unless the lands so taken shall be purchased for the purposes aforesaid, compensation therefor shall be ascertained in the manner prescribed in this act for acquiring title to real estate, and duly made by said corporation to the owners and persons interested in such lands. The same, when so taken, shall become a part of such intersecting highway, turnpike or plank-road, in such manner and by such tenure as the adjacent parts of the same highway, turnpike or plank-road may be held for highway purposes. (*Laws* 1850, *chap.* 140, § 24.)

Under the provision of the general railroad act (§ 24, *chap.* 140, *Laws* of 1850), authorizing a railroad corporation, whenever its tracks shall cross a highway, to carry the highway over or under the track "as may be found most expedient," the election as to the mode of crossing is, as a general rule, with the corporation, and, when exercised in good faith, is not reversable. (*People* v. *N. Y. C. R. R. Co.*, 74 N. Y., 302.) It seems, however, that where it would be impracticable to restore the highway to any reasonable degree of usefulness by a particular mode of crossing, that mode would not be permitted. (*Id.*) The question of grade of the railroad is not a proper element of inquiry upon the question whether the highway has been restored to usefulness. (*Id.*) When a railroad corporation crosses a highway over its track by a bridge, it is its duty not only to properly make the approaches to the bridge, but also to keep them in suitable repair. (*Id.*)

§ **190.** *Commissioners of highways may consent to construction of railroad across public highway.*—Whenever any association or individual shall construct a railroad upon land purchased for that purpose, on a route which shall cross any road or other public highway, it shall be lawful for the commissioners of highways, having the supervision thereof, to give a written consent that such railroad may be constructed across, or on such road or other public highway; and thereafter such association or individual shall be authorized to construct and use a railroad across, or on such road or other highways as the commissioners aforesaid shall have permitted; but any public highway thus intersected

or crossed by a railroad, shall be so restored to its former state as not to have impaired its usefulness. (*Laws* 1835, *chap.* 300, § 1.)

§ **191.** *Commissioners of highways to enforce duty of company respecting highways.*—The commissioner or commissioners of highways in each of the towns of this State, are hereby empowered to bring any action against any railroad corporation that may be necessary or proper to sustain the rights of the public in and to any highway in such town, and to enforce the performance of any duty enjoined upon any railroad corporation in relation to any highway in the town of which they are commissioners, and to maintain an action for damages or expenses which any town may sustain or may have sustained, or may be put to or may have been put to, in consequence of any act or omission of any such corporation in violation of any law in relation to such highway. (*Laws* 1855, *chap.* 255, § 1.)

§ **192.** *Railroad company to compensate turnpikes and plank-road companies for crossing the same.*—In case any railroad shall occupy or cross any turnpike or plank-road, the railroad company shall pay such turnpike or plank-road company all damages the turnpike or plank-road company may sustain by reason of the occupancy or crossing such turnpike or plank-road, the damages to be ascertained and paid in the same manner as is provided by law for the assessment and payment of damages in case of taking private property for the use of railroad companies. (*Laws* 1851, *chap.* 19, § 4.)

Subdivision 5, of section 28 of the general railroad act (Laws 1850, chap. 140, sec. 183, *ante*), which gives the company power to construct its road across or upon any stream of water, water-course, street, highway, plank-road, turnpike, etc., only conveys the right which the public has in such stream of water, etc., and makes no provision for the case where the consent of the owners is not obtained; but the section stated in the text gives the company, in the absence of the consent of the turnpike or plank-road company, the authority to occupy or cross such turnpike or plank-road, upon payment of the sum awarded by the commissioners. (*Ellicottville, etc., Plank-road Co.* v. *Buffalo, etc., R. Co.*, 20 Barb., 644; *Troy and Boston R. Co.* v. *Northern R. Co.*, 16 id., 100.)

§ **193.** *Change of route of road.*—The directors of every company formed under this act may, by a vote of two-thirds of their whole number, at any time alter or change the route or any part of the route of their road, or its termini, or locate the said route or any part thereof or its termini in a county adjoining any county named in the articles of association, if it shall appear to them that the line can be im-

proved thereby; and they shall make and file in the clerk's office of the proper county a survey, map and certificate of such alteration or change, and shall have the same right and power to acquire title to any lands required for the purposes of the company in such altered or changed route as if the road had been located there in the first instance; and no such alteration shall be made in any city or village after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the common council of said city, or trustees of said village; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. Nothing herein shall be construed to authorize the change of either terminus to any other county than one adjoining that in which it was previously located, nor the reduction of the amount of capital stock per mile below that now required by law. All the provisions of this act relating to the first location, and to acquire title to land, shall apply to every such new or altered portion of the route. Nor shall the provision of this section authorize the alteration of the route of terminus of any railroad in any town, county or municipal corporation which has issued bonds, or any town which may be bonded, but whose bonds have not yet been issued or subscribed for, and taken any stock or bonds in aid of the construction of such railroad without the consent in writing of, and subscribed by a majority of the tax payers appearing upon the last assessment roll of said town, county or municipal corporation. (*Laws* 1850, *chap.* 140, § 23, *as amended by Laws* 1876, *chap.* 77.)

Where the act of incorporation, or articles of association, prescribe the limits within which a railroad company shall construct its road, it cannot, even under section 23 of the general railroad act, alter or change the route, after it has been located, so as to transcend those limits; at least not without releasing previous subscribers for stock who have not consented to such change. By making such change previous subscribers are released. (18 Barb., 312; *Supreme Ct.*, 1856, *Buffalo, Corning and N. Y. R. R. Co.* v. *Pottle*, 23 Barb., 21.) The change of route, authorized by this section, does not revest the title to any land previously acquired by the company, in the former owner; nor can the company avoid payment of the lands first acquired on the ground that subsequently to the appraisal thereof, the route of its road had been so changed that the said lands were no longer necessary for its track. (*Crowner* v. *Watertown and Rome R. R. Co.*, 9 How. Pr., 457.)

The papers disclosd that the land sought to be condemned was for the purpose of obtaining additional and increased facilities for the transaction of business connected with petitioner's railroad. *Held*, that the fact that the land lay at the end of the route of said road and that the area of territory for tracks and other purposes would be greatly enlarged by its acquisition, did not establish

that the proceedings were for a change of terminus within the meaning of the act of 1876 (chap. 77, Laws of 1876), and so that the consent of two-thirds of the common council of the city, as required by said act, was not requisite; but held that even if such consent was necessary it was not required to be obtained in advance of proceedings against the individual owners. (*In re N. Y. C. R. R. Co.*, 77 N. Y., 248.)

Section 23 of Laws 1850, chapter 140, previous to its amendment, was as follows:

The directors of every company formed under this act may, by a vote of two-thirds of their whole number, at any time alter or change the route, or any part of the route of their road, if it shall appear to them that the line can be improved thereby; and they shall make and file in the clerk's office of the proper county, a survey, map and certificate of such alteration or change; and shall have the same right and power to acquire title to any lands required for the purposes of the company, in such altered or changed route, as if the road had been located there in the first instance; and no such alteration shall be made in any city or village, after the road shall have been constructed, unless the same is sanctioned by a vote of two-thirds of the common council of said city or trustees of said village; and in case of any alteration made in the route of any railroad after the company has commenced grading, compensation shall be made to all persons for injury so done to any lands that may have been donated to the company. All the provisions of this act relative to the first location, and to acquiring title to land, shall apply to every such new or altered portion of the route.

§ **194.** *Changing route of road.*—The act of 1847 reads as follows: Any railroad company, the route of whose railroad or some part thereof, shall have been located in the manner prescribed by law, may change any part of such route so located, on which its railroad shall not have been constructed, but no such change shall vary the route of such railroad to exceed one mile, laterally, from the route which shall have been so located; and the new location of any portion of such route, when so changed, shall be made in the same manner, as nearly as may be, as the first location was required by law to be made. When any portion of such route shall be so changed, such company may take and hold such lands for the construction of its railroad over such portion of its route as it would have been authorized by law to take and hold for that purpose if such portion of its route had originally been located as it shall be by such change; and when the owner of any such lands shall from any cause be incapable of selling the same, or if such company cannot agree with such owner for the purchase thereof; or, if after diligent search and inquiry, the name and residence of such owner cannot be ascertained, such company may acquire the title to such lands in the manner prescribed by the twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first,

twenty-second, twenty-third, twenty-fourth, twenty-fifth, twenty-seventh, twenty-eighth, twenty-ninth and thirtieth sections of chapter two hundred and ten of the laws of eighteen hundred and forty-seven. (*Laws* 1847, *chap.* 404, § 1.)

Chapter 210 of the Laws of 1847, above referred to, relates to the incorporation of plank-roads, and the construction of turnpikes. For an amendment to said last-mentioned act, see chapter 398 of the Laws of 1847.

§ **195.** *Change of portions of road to improve grade previous to the general railroad act.*—Any railroad company is hereby authorized to change portions of the line of its railroad track for the purpose of improving the grades or curves; provided that in no case such alteration or change shall vary the track of such railroad to exceed one mile, laterally, from its present location at any point; but nothing herein contained shall be construed to authorize any railroad company to obtain the lands or right of way for said purposes in any other manner than by purchase or voluntary consent of parties. (*Laws* 1847, *chap.* 272, § 4.)

§ **196.** *Construction of part of line in 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 twenty-sixth, eighteen hundred and forty-eight, or 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, 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 the State shall be deemed a connected line, according to the articles of association, and the directors may reduce the capital 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.)

§ **197.** *Line common to two companies, how constructed.*—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. (*Laws* 1851, *chap.* 19, § 1.)

§ **198.** *Same—reserving clause as to railroads in cities.*—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. (*Laws* 1854, *chap.* 282, § 13.)

§ **199.** *Width of the road.*—Every corporation formed under this act,* shall have power 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. (*Laws* 1850, *chap.* 140, § 28, *subd.* 4; *as re-enacted by Laws* 1880, *chap.* 133.)

Duty of the company to maintain a suitable track and roadway.

The rule that a common carrier must provide road-worthy vehicles, applies to require a railroad company to provide a track worthy of the vehicle. The company is bound to lay and maintain its track properly, and where the accident occurred from a broken rail, the fact whether the rail was in sound condition at the time the train came upon it, is to be determined by the jury. (*Supreme Ct.*, 1866, *McPadden* v. *N. Y. C. R. R. Co.*, 47 Barb., 247.) Evidence of the bad

* Laws 1850, chap. 140.

condition of the road beyond the place where the accident occurred is also admissible. (*Reed* v. *N. Y. C. R. R. Co.*, 56 N. Y., 493.)

When a railroad company are duly authorized to lay their track in one of the streets of a city, they are not, at all events and without proof of negligence or want of skill and reasonable care, liable for accidents which may be caused by the existence of the track there. (*N. Y. Com. Pl.*, 1854, *Mazetti* v. *N. Y. and Harlem R. R. Co.*, 3 E. D. Smith, 98.) The company is liable for negligence in using defective ties, or in laying its rails in such a manner that within the ordinary extremes of cold and heat, they expand so as to be pressed out of place. And where it appeared that the contraction and expansion of rails, of the length of those used, between the ordinary extremes of heat and cold was from three eighths to one-half an inch in each bar, and that the rails upon the defendant's road were laid with spaces of not more than one-quarter of an inch between them, *Held*—that the jury were authorized to find that the rails were negligently laid. (*Reed* v. *N. Y. C. R. R. Co.*, 56 N. Y., 493.)

A person driving in his carriage along a city railroad track, and injured by the projection of a spike which the company ought not to have permitted, may recover from the company, although there was room in other parts of the street for him to have passed. (*N. Y. Com. Pl.*, 1861, *Fash* v. *Third Av. R. R. Co.*, 1 Daly, 148.) In an action for damages for an injury alleged to have been occasioned by the bad condition of the road, the declarations of the engineer of the company, made while actually engaged upon the work, and in respect to its proper construction, are part of the *res gestæ*. (*Brehm* v. *Great Western R. Co.*, 34 Barb., 250) Where the train was thrown from the track by the act of some unknown person, who shortly before the passage of the train drew the spikes which fastened the rails, the company is not liable for the consequences of such culpable act. (*Deyo* v. *Same*, 34 N. Y., 9; 39 id., 227.)

Prima facie liability for accident by broken rail (*Brignoli* v. *Chicago and G. E., etc., Co.*, 4 Daly. 182). As to duty to employ switchmen or patent switch (*Piper* v. *N. Y. C. R. R. Co.*, 1 Supreme Ct. [T. & C.], 290; affirmed 56 N. Y., 630.) Company not liable for malicious misplacement of switch by stranger (*Keely* v. *Erie R. Co.*; 47 How. Pr., 256). Negligence in leaving hole in depot floor (*Liscomb* v. *N. J. R. R., etc.*, 6 Lans., 75.)

In the *International and Great Northern R. R. Co.* v. *Halloran* (Texas Supreme Ct., 1880), reported in the Albany Law Journal, vol. 22, page 72, the undisputed facts in the case showed substantially:

1. That defendant's road was of first class, only three years old, and in good order at the place of the accident; that the ties and iron were sound and good.

2. That in the latter part of the day, and about the dark of the day of the accident, an unprecedentedly heavy rain fell in that locality, which was not general, but which caused the embankment to give way under the train as it passed over the place, and thus caused the disaster.

3. That the track at that place was sound and in good condition as far as could be seen only 125 minutes prior to the occurrence, when the north bound train passed over it.

4. That between that time and the occurrence of the accident, that section of the road embracing the place of the accident was inspected, and found and left in good condition, and was still in good condition at the time the wrecked train ran on to it, as far as could be seen; had its usual appearance to an engineer who had been running over it ever since the road was built.

5. That the train and engine were in good condition, having been so found on examination only one hour before the accident, and were properly manned.

6. That the accident occurred seventy minutes after leaving Palestine, and sixteen miles from that place, when the train was running at about half speed, on a track which was apparently safe at all times for that rate.

7. That it had rained during the day at Palestine, but not so hard as to make it necessary to give orders in reference to the track.

The evidence, as thus disclosed by the record, showed that the defendant company had used a commendable degree of skill, prudence and vigilance in the construction and management of its road, and that the misfortune to the plaintiff was the result of one of those inevitable accidents of which passengers assume the risk, and for which the law does not hold the company responsible in damages. (Angell on Carriers, § 523.)

The following consists of extracts from the opinion in the case above cited:

A carrier of passengers upon an ordinary road is not responsible for its condition, as it is not under his control and supervision. A different rule, however, prevails as regards a railroad corporation, which, under extraordinary grants of franchise, builds, controls, and generally has the exclusive use of its road-bed and track.

A passenger on a railroad train, by reason of the risk naturally incident to this mode of travel, has the right to demand of the company for his safe passage, that high degree of care and skill which very cautious persons generally, in their line of business, are accustomed to use, under similar circumstances, to prevent danger. This care and skill pertains to the original construction, by competent engineers and workmen, of the road-bed, track, engines, cars, and other appliances necessary to carry on properly the business of its road, and to operate its trains; the frequent and careful examination of the same, to see that they have been thus constructed and have been kept in safe condition and repair to prevent accidents, so far as human skill and foresight could have reasonably anticipated and avoided; and also to the employment of a sufficient number of good, steady and competent agents and employees to so conduct and control the train as to insure its careful and skillful management.

If the company is negligent in any of these particulars, and this negligence is the legal cause of injury to the passenger, it is liable in damages. (Shearm. & Redf. on Neg., §§ 266, 269, 444; Angel on Carriers, §§ 538, 540.)

Railroad companies, however, are not insurers of the safety of their passengers further than could be required by the exercise of such high degree of foresight as to possible dangers, and such high degree of prudence in guarding against them which would be used by very cautious and prudent competent persons under similar circumstances. (Angel on Carriers, §§ 568, 570; Cooley on Torts, 642; *Galena and Chicago R. R. Co.* v. *Fay*, 16 Ill., 558; *Bowen* v. *N. Y. C. R. R. Co.*, 18 N. Y., 411; *McPadden* v. *N. Y. C. R. R. Co.*, 44 id., 478.)

This is not understood to require of the company every possible precaution which ingenuity might suggest or the skill of science might afford, by which accidents might be avoided; but means that it should adopt such precautions of known value which have been practically tested, and should employ such necessary skilled labor, service and experience, as is reasonably within its power to have secured.

The test of liability is, not whether the company used such particular pre-

cautions as evidently, after the accident happened, might have averted it, had the danger been known; but whether it used that degree of care and prudence which very cautious, competent persons would have used under the apparent circumstances of the case, to have prevented the accident, without reasonable knowledge that it was likely to have occurred. (Shearm. & Redf. on Neg. § 266; *Bowen* v. *N. Y. C. R. R. Co.*, 18 N. Y., 408.)

A railroad company is required to so construct its road-bed and track as to avoid such damages as could have been reasonably foreseen by competent and skillful engineers, from the ordinary rainfalls and freshets incident to the particular section of the country through which they are constructed, but would not have been guilty of such culpable negligence as to make it liable in damages, if it failed to provide against such extraordinary floods or other inevitable casualties, caused by some hidden force of nature, unknown to common experience, and which could not have been reasonably anticipated by the ordinary engineering skill and experience required in the prudent construction of such railroads. If an accident should happen from such cause on a road-bed and track which had been properly constructed and kept in good repair, when the agents and employees in charge of the train were in the due exercise of that degree of caution and prudence necessary at all times; and when they did not have, from information conveyed to them, or from their own personal observation, reasonable grounds to anticipate impending danger, and consequently did not use such extraordinary precaution as might have otherwise averted it, then the law characterizes it as an act of God, or such inevitable accident as is incidental to all human works, and which would relieve the company from liability. Even under the rigid rules of the common law, which made common carriers insurers of the safe delivery of all articles committed to their care, such cause would have excused them. (Shearm. & Redf. on Neg., § 290; *Withers* v. *North Kent R. R. Co.*, 27 L. J. Exch. 417; *Railroad Co.* v. *Reeves*, 19 Wall., 176; *Livezey* v. *Philadelphia*, 64 Penn. St., 106.)

§ **200.** *Companies may construct road of narrow gauge.*—Any railroad corporation, now duly organized and legally kept in existence, which has not constructed its railroad, may construct a railroad of the gauge hereinbefore 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 all other provisions of law not inconsistent herewith. (*Laws* 1871, *chap.* 560, § 7.)

The guage referred to in the text is a guage of three feet and six inches or less, but not less than thirty inches. (*Laws* 1871, *chap.* 560, § 5.) See chapter 2, *ante*, "narrow guage railroads."

§ **201.** *Weight of rail to be used.*—No company formed under this act,* shall lay down or use in the construction of their road any iron rail of less weight than fifty-six pounds to the lineal yard on grades of one hundred and ten feet to the mile or under, and not less than seventy pounds

* Laws 1850, chap. 140.

to the lineal yard on grades of over one hundred and ten feet to the mile, except for turnouts, sidings and switches, provided this section shall apply only to roads now being constructed or hereafter to be constructed, when the guage of said road exceeds four feet or over. (*Laws* 1850, *chap.* 140, § 27, *as amended by Laws* 1862, *chap.* 449, *as amended by Laws* 1870, *chap.* 669, § 1.)

The following is the previous legislation upon this subject: No company formed under this act shall lay down, or use in the construction of their road, any iron rail of less weight than fifty-six pounds to the lineal yard, except for turnouts, sidings and switches. (*Laws* 1850, *chap.* 140, § 27.)

No company formed under this act shall lay down or use in the construction of their road any iron rail of less weight than fifty-six pounds to the lineal yard, except for turnouts, sidings and switches, and roads upon which steam power cannot by law be used; and on the last mentioned roads such weight shall not be less than forty pounds to the lineal yard. (*Laws* 1862, *chap.* 449.)

§ **202.** *Weight of rail to be used—act of* 1847.—Every railroad, the track of which shall hereafter be constructed or relaid in whole or in part, the rail laid down shall be of iron and at least fifty-six pounds weight to every lineal yard, and for the purpose of enabling the companies owning such tracks, or authorized to construct a railroad track, to comply with the provision of this section, they are hereby authorized to increase their capital stock or borrow money upon the security of their road, its appurtenances and franchises, according to the provisions of the first section of this act, but nothing herein contained shall be so construed as to authorize the increase of capital or the borrowing of money for any other purpose. (*Laws* 1847, *chap.* 272, § 5.)

For other legislation upon this subject, prior to the passage of the general railroad act of 1850, see chapter 271, Laws of 1849. Concerning the privileges of companies who lay down and pay for new rail in regard to converting bonds issued to borrow money for relaying the road into stock; and paying bonds out of earnings of the road and dividing such stock among the stockholders or selling the same at auction and dividing proceeds of sale of stock among the stockholders, see also Laws of 1847. That if the directors should deem it advisable to lay a second track, the same should be laid with the heavy iron rail, and for such purpose the company were authorized to increase its capital stock, or to borrow money on its railroad, etc. (*Laws* 1847, *chap.* 405, § 1.)

See also Laws of 1847 that any railroad company using steam power in propelling its cars, whose track was then laid in whole or in part with the flat bar rail was authorized to substitute upon its track or tracks the heavy iron rail, weighing fifty-six pounds to the lineal yard, and to increase its capital stock, or borrow money upon the security of its road, etc., as the directors of such company might determine, subject to all previous incumbrances to the State or individuals, to an amount sufficient to accomplish such end: Provided, that no increase of capital or indebtedness on the part of said company should exceed in the aggregate the sum of $10,000 per mile for each mile of the entire length

of its railroad. This act provided penalties for certain railroads who should within given times neglect to substitute the heavy iron rails for the flat bar rail then in use. (*Laws* 1847, *chap.* 272, §§ 1 and 2.)

§ **203.** *Sign boards at railroad crossings.*—Every such corporation shall cause boards to be placed, well supported by posts or otherwise, and constantly maintained across each traveled public road or street where the same is crossed by the railroad, on the same level. Said boards shall be elevated so as not to obstruct the travel, and to be easily seen by travelers; and on each side of such boards shall be painted in capital letters, of at least the size of nine inches each, the words, "Railroad crossing, look out for the cars." But this section shall not apply to streets in cities or villages, unless the corporation shall be required to put up such boards by the officers having charge of such streets. (*General railroad act, Laws of* 1850, *chap.* 140, § 40.)

The company is not required to keep a flagman at its crossing of a public street, to notify passers-by of the approach of a train, but where, for its own convenience, it elects to do so, it is guilty of negligence in afterwards withdrawing such flagman without notice. (*Ernst* v. *Hudson River R. R Co.*, 39 N. Y., 61; S. C., 61 How. Pr., 84.) It has been held that the provisions in relation to sounding the bell or whistle of the engine, and putting up boards, require those acts to be done at the crossing of roads or streets, while the provision as to the construction of cattle-guards is applicable only to road crossings, the statute making a distinction between roads and streets (*Vandekar* v. *Rensselaer and Saratoga R. R. Co.*, 13 Barb., 390; *Parker* v. *Same*, 16 id., 315); but see *Brace* v. *The N. Y. Central R. R. Co.* (27 N. Y., 269), overruling in effect the above cited cases of Vandekar and Parker, and holding there was no distinction between roads and streets in the cases of cattle guards (see note to § 204, *post*). It seems the statute *in both instances* applies as well to streets as road crossings.

§ **204.** *Railroad fences, cattle-guards and farm crossings to be erected and maintained.*—Every corporation formed under this act shall erect and maintain fences on the sides of their road, of the height and strength of a division fence required by law, with openings or gates or bars therein, and farm crossings of the road for the use of the proprietors of lands adjoining such railroad; and also construct and maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle and animals from getting on to the railroad. Until such fences and cattle-guards shall be duly made, the corporation and its agents shall be liable for all damages which shall be done by their agents or engines to cattle, horses, or other animals thereon; and after such fences and guards shall be duly made and maintained, the corporation shall not be liable for any such damages, unless negligently or willfully done; and if any per-

son shall ride, lead or drive any horse or other animal upon such road, and within such fences and guards, other than at farm crossings, without the consent of the corporation, he shall, for every such offense, forfeit a sum not exceeding ten dollars, and shall also pay all damages which shall be sustained thereby to the party aggrieved. (*Gen'l R. R. Act, Laws* 1850, *chap.* 140, § 44.)

To whom the act applies.

A foreign railroad corporation, running its trains over the road of a railroad corporation of this State, is not liable for an injury to cattle caused by its train, but to which the negligence of the owner contributed, though the road was not fenced, as required by the act of 1850. The foreign corporation is not bound to fence the track. (*Westchester County Ct.*, 1860, *Schanchan* v. *N. Y. and New Haven R. R. Co.*, 10 Abb. Pr., 398; to the contrary, *N. Y. Com. Pl.*, 1860, *Labussiere* v. *N. Y. and New Haven R. R. Co.*, 10 Abb. Pr., 398, *note.*) The provisions of this section apply to all railroad corporations in the State, whether then existing or thereafter to be formed, and whether created by special act, or organized under the general law. (*Staats* v. *Hudson R. R. R. Co.*, 3 Keyes, 196; S. C., 33 How. Pr., 139.) See, also, Laws 1854, chap. 282, §§ 8 *et* 9, as to its application to all railroad corporations whose line of road is open for use.

Lessees of any railroad corporation must maintain fences and cattle-guards, or be liable for damages done to cattle by reason of their failure so to do. (*Laws of* 1864, 1335, *chap.* 582. § 2.)

Under section 44 of the general railroad act, as amended (*Laws of* 1850, *chap.* 140; *Laws of* 1854, *chap.* 282, § 8)—which requires every railroad company to maintain fences on the sides of its road—a railroad company running its trains regularly over a track not belonging to it, but which was constructed by an association formed by the co-operation of several companies, for their joint use, and under an arrangement giving the several companies a permanent right to use the road to the exclusion of the association who actually constructed it, is liable for an injury by its trains resulting from the want of fences upon such track. The statute is for the protection of travelers and the owners of animals, and should receive a liberal construction. Operative railroad companies, for whose use a road is constructed by a company formed for the purpose, but which runs no trains of its own, must be held liable to respond to the obligations imposed by the general railroad act. (28 Vt., 302; *Ct of Appeals*, 1868. *Tracy* v. *Troy and Boston R. R. Co.*, 38 N. Y., 433.)

The acts of 1839 and 1847 permit one company to run its cars over the road of another by arrangement; and the former is not liable for an accident in so running produced by the negligence of the other to erect fences and cattle guards, and without negligence on its own part in running the cars. (*Supreme Ct.*, 1853, *Parker* v. *Rensselaer and Saratoga R. R. Co.*, 16 Barb., 315.) The following decisions were made under the former general railroad act: The provisions of the general railroad act of 1848, relative to fences—*Held* applicable to all then existing corporations. (*Supreme Ct.*, 1850, *Suydam* v. *Moore*, 8 Barb., 358; *Waldron* v. *Rensselaer and Saratoga R. R. Co.*, id., 390; followed, 1852, *Talmadge* v. *Rensselaer and Saratoga R. R. Co.*, 13 id., 493.) The contrary held in respect to farm crossings in a case where, before the passage of the act, a railroad company acquired the title by payment of compensation.

(1850, *Milliman* v. *Oswego and Syracuse R. R. Co.*, 10 Barb., 87; but see *Staats* v. *Hudson R. R. R. Co.*, *supra*, and *Laws* 1854, *chap.* 282, §§ 8, 9.)

Under the act of 1848—which made the corporation and its agents liable for all damages which shall be done by their agents or engines, to cattle, etc., before the erection of division fences and cattle-guards—the engineer and fireman, who was the servant of the engineer, were *held* chargeable, severally, or jointly with the corporation. (*Supreme Ct.*, 1850, *Suydam* v. *Moore*, 8 Barb., 358; and see *Corwin* v. *N. Y. and Erie R. R. Co.*, 13 id., [3 Kern.], 42.) As to duty to fences notwithstanding lease, see *Ditchelt* v. *Spuyten Duyvil, etc., R. R. Co.*, 5 Hun, 165.

Fencing the road.

A railroad company, in order to secure the protection of section 44 of the general railroad act (Laws of 1850, chap. 233), from liability for damage to animals on their track, must not only erect but maintain the fences and cattle-guards required by the statute. (*Supreme Ct.*, 1862, *McDowell* v. *N. Y. Central R. R. Co.*, 37 Barb., 195.) A crooked or Virginia fence, of which every corner projects over the line, alternately upon the land of the adjoining proprietor and that of the company, is a fence upon the sides of the railroad, within the meaning of the statute; and the company commit no trespass upon the land of the adjoining proprietor in erecting such fence. This kind of fence has been built as a division fence time out of mind. (*Supreme Ct.*, 1854, *Ferris* v. *Van Buskirk*, 18 Barb., 397.) The whole duty of erecting fences rests upon the company, and the statute does not authorize the land owner to construct the fence, if the railroad company neglect or refuse so to do, and recover of the road therefor. (*Shepherd* v. *Buffalo, etc., R. R. Co.*, 35 N. Y., 641.) A sufficient post and wire fence of requisite height is a lawful fence. (Laws 1854, chap. 282. § 8). It must be a substantial fence *Corwin* v. *Erie R. Co.*, 13 N. Y., 54); such a one that will keep horses and cattle which are orderly from getting on the track (*Tallman* v. *Syracuse, etc., R. Co.*, 4 Keyes, 128). That no question can arise as to the height or strength of the fencing required from a railroad company, by the general railroad act, in a case where no fence at all was erected, see *idem*. Each town, at its annual meeting, may prescribe what shall be deemed a sufficient fence in such town (1 R. S., 341, § 5, sub. 11). The regulations respecting fences, which towns are authorized to make, do not apply to railroads, for they cannot be completely inclosed; and if cattle stray upon a railroad and are killed by a train, the company is not liable. (*Supreme Ct.*, 1848, *Tonawanda R. R. Co.* v. *Munger*, 5 Den., 255.) This decision was prior to the passage of the general railroad act of 1850, and the charter of the company contained no provision in regard to fences.

The company are not liable for the death of an animal from fright caused by the unusual noise made by the engine and train, unless they are chargeable with negligence in the construction of the road so near the highway, and without a proper screen, in which case they may be held liable. (*Supreme Ct.*, 1850, *Moshier* v. *Utica and Schenectady R. R. Co.*, 8 Barb., 427.) Railroad companies, in the use and management of their roads, are bound only to use ordinary care; and the omission to erect fences, screens or guards between their road and a highway or turnpike contiguous thereto cannot be considered a want of such care. (*Supreme Ct.*, 1855, *Coy* v. *Utica and Schenectady R. R. Co.*, 23 Barb., 643; disapproving *Moshier* v. *Same*, 8 id., 427; *supra*, 120.) The statute fence is a sufficient performance of the contract (*Thompson* v. *N. Y. and Harlem R.*

R. Co., 1 Sup. Ct. [T. & C.], 411). As to duty to keep gate in fence closed (*Spinner* v. *N. Y. Central, etc., R. R. Co.*, 6 Hun, 600).

Under the provisions of the general railroad act (§ 44, chap. 140, Laws of 1850, § 8, chap. 282, Laws of 1854), requiring every corporation formed under it to erect and maintain fences on the sides of its road, no exception is made or permission given for openings or gates for the use of the corporation or its customers or the public generally, but only for the use of adjoining proprietors, and if it permits or acquiesces in the use in its business by its customers of a gate constructed by it at a farm crossing, so that the gate does not serve the end of a fence, it is in default. (*Spinner* v. *N. Y. Central R. R. Co.*, 153). The provision of the general railroad act as amended in 1854 (chap. 282, Laws of 1854), imposing upon corporations formed under it the duty of erecting and maintaining fences on the sides of their roads, does not apply to the protection of teamsters upon a highway (*Delchert* v. *S. D. and P. M. R. R. Co.*, 67 N. Y., 425). That the statute in regard to fencing applies to foreign corporations (*Purdy* v. *N. Y. C. R. R. Co.*, 61 N. Y., 354.)

Farm crossings.

An owner, whose farm is divided by a railroad, has a right to a reasonable election of a place for a farm crossing; but the company may, for their own convenience, make it at another place, making him compensation. Where, at the time of appraisement, the owner pointed out where he wished it, and nothing more was said on the subject, and the title of the company being perfected, they were about to make the crossing at another place to the detriment of the farm—*Held*, that the company should be enjoined from constructing their road through the farm until they would engage to make the crossing at the place selected by the owner, or make compensation for the difference of location. (*Supreme Ct.*, 1851, *Wheeler* v. *Rochester and Syracuse R. R. Co.*, 12 Barb., 227.) In this case the defendants procured an appraisal of the lands of the plaintiff taken by them for their railroad. At the time of the appraisal, there had been no agreement in reference to the farm crossing, nor any location of it, further than that the plaintiff, in the presence of the agent of the railroad, and the commissioners, pointed out where he wished it to be made, and no objection was then raised on the part of the company. But on the title of the company being perfected, they proceeded to construct their road along an embankment, locating the crossing at a different point from that indicated by the plaintiff, and greatly to his detriment. (*Id.;* but see *Wademan* v. *A. and S. R. R. Co.*, 51 N. Y., 568, *infra;* overruling, *The Wheeler Case.*) The term "farm crossing," does not necessarily mean *passing over*, and if the corporation so construct their road as to render a passage over it, to or from the land from which it has been severed inconvenient or impracticable, they are bound to furnish one under it, however expensive they may find it. (*Id.*)

Under sections 44, 50, of the general railroad act, companies are bound to make the land crossings as well on a village lot as on a farm, and as well where their right was obtained by agreement with the owners, as where it was acquired by compulsory proceedings. (*Supreme Ct.*, 1854, *Clarke* v. *Rochester, etc., R. R. Co.*, 18 Barb., 350.) In the case last cited, the plaintiff sold to the company, for the purposes of their track, a strip of land running through his village lot, without reserving the right of crossing the same, and the railroad company erected an embankment thereon, which rendered the passage from one portion of the lot to another difficult and inconvenient, but it was shown

that the unsold portion of the lot was of small value, while the cost of constructing a crossing would greatly exceed the value thereof to the plaintiff, and no special circumstances appeared in regard to the manner of using the land, rendering a crossing necessary: *Held*, that this was not a case in which the court ought to adjudge a specific performance, by the company, of the duty imposed on them, but that the plaintiff should be left to his remedy for damages. (*Id.*) It does not alter the obligation of the company to construct farm crossings in cases where the lands occupied by the railroad were obtained by agreement with, and conveyance from the owners, and where title was acquired by the special proceedings provided by the statute in cases of disagreement between the company and the owner. (*Id.*)

Under the provisions of the general railroad act of 1850, requiring every corporation organized under that act to erect and maintain farm crossings, etc., for the use of proprietors of lands adjoining such railroad (§ 44, *chap.* 141, *Laws* of 1850), it is the right of the corporation to determine where the crossing shall be located. In the exercise of this right, however, the interest of the corporation is not alone to be considered, but regard must be had to the convenience of both parties, and such a location must be made as will not subject the proprietor to needless and unreasonable injury. (*Wademan* v. *A. and S. R. R. Co.*, 51 N. Y., 568; overruling, *Wheeler* v. *Rochester and Syracuse R. R. Co.*, *supra.*) The plaintiff, in the above case, was a land owner upon both sides of the defendant's road, and brought the action to compel it to erect a suitable farm crossing; also claiming damages. The trial court found that the crossing, built by the defendant, was inconvenient for the plaintiff, and that the proper place for a crossing was where plaintiff desired: *Held*, that this established a cause of action, the court, instead of directing a specific performance by the defendant of the obligation, gave a pecuniary compensation. (See *Clarke* v. *Rochester, etc., R. R. Co*, *supra.*)

A conveyance in fee, without reservation or exception, to a railroad corporation for a right of way of its road across a farm, is not a waiver or release of the obligation imposed upon the corporation by the general railroad act (§ 44, chap. 140, Laws of 1850) to erect and maintain farm crossings. The statute applies as well to cases where the lands are acquired by purchase as where they are acquired compulsorily by the power of eminent domain. (*Smith* v. *N. Y. and O. M. R. R. Co.*, 63 N. Y., 58.)

Cattle guards.

Railroad companies are required to erect and maintain fences on the sides of their roads, and to construct cattle guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on such railroad track. And the fact that the road crossing is at or near the depot, and that, to make such cattle guard there would inconvenience the company, will not excuse them from complying with the positive requirements of the statute. (*Ct. of Appeals*, 1866, *Bradley* v. *Buffalo, N. Y. and Erie R. R. Co.*, 34 N. Y., 427.) The requirement of cattle guards at road crossings does not apply to the crossings of a street in a village or city. (*Supreme Ct.*, 1851, *Vanderkar* v. *Rensselaer and Saratoga R. R. Co.*, 13 Barb., 390; followed, 1853, *Parker* v. *Same*, 16 id., 315; and see *Halloran* v. *N. Y. and Harlem R. R. Co.*, 2 E. D. Smith, 257; *Bowman* v. *Troy and Boston R. R. Co.*, 37 Barb., 516.)

Contra. The statute requiring railroad corporations to maintain cattle guards at road crossings applies as well to streets which are crossed by railroads in vil-

lages as to country highways. (*Ct. of Appeals*, 1863, *Bruce* v. *N. Y. Central R. R. Co.*, 27 N. Y., 269.) Where the track, running through one street, is crossed by another street, in such a manner that the construction and maintenance of cattle guards would necessarily obstruct the use of either street; that is, it is not required to construct cattle guards longitudinally along its track so as to impede the passage along the street crossing it. (*Idem.*)

In *Bruce* v. *The N. Y. Cent. R. R. Co.*, *supra*, the cases of Vanderkar and Parker, cited above, were cited by the defendants counsel, and considered by the court; and Wright, J., in his opinion, in that case said: "It cannot be doubted that this provision applies to streets and to cities and villages. I find nothing in the statute from which it may be fairly inferred that the Legislature intended to limit the duty of railroad corporations to the maintenance of cattle-guards at crossings of public roads or thoroughfares outside of villages." They certainly have not said so in terms, and the phrase "at all railroad crossings" is quite comprehensive enough to include all crossings of public highways, whether called streets in a village or roads outside thereof. The public highway which was under consideration in the above case was located in a village, but in addition to the language used by Justice Wright, Mason, J., in his opinion in the same case, says that, in his opinion, no inference can be drawn from the word "street" that the Legislature intended by the use of the words "all road crossings" to make a distinction between a road and a street, and to exclude the latter from the requirements of the forty-fourth section touching cattle-guards, and that a street is a road in a village or city, and that a road in a village or city is usually and properly called a street, but that the act requiring cattle-guards at road crossings does not extend to farm crossings and private ways. (See *Supreme Ct.*, 1852, *Brooks* v. *N. Y. and Erie R. R. Co.*, 13 Barb., 594.)

The liability of the company for not complying with the provisions of the statute.

The decisions of the courts in this State have fluctuated in regard to the question of the liability of the company in cases of injuries to animals occasioned by a neglect to comply with the provisions of the statute in regard to the erection and maintenance of fences and cattle guards, some cases holding that the permitting of the animals to run at large or to be unlawfully in the highway or to negligently escape upon the line of the railroad is such a negligent act of the owner as to constitute a defense and bar a recovery against the corporation for the damage. Among the decisions sustaining the doctrine that the negligence of the plaintiff is a bar to an action for injuries to cattle, occasioned by the omission to fence, may be cited the following: Permitting one's cattle to be at large in the highway at a railroad crossing, at the usual time of passage of trains, is negligence, and bars a recovery for damage to them by the train in passing. So where the cattle are trespassers in the highways the owner cannot recover, though the company's servants were grossly negligent; *e. g.*, where the cattle were pastured on an open lot adjoining the highway. (*Supreme Ct.*, 1851, *Clark* v. *Syracuse and Utica R. R. Co.*, 11 Barb., 112.) For the unsoundness of this doctrine, see *Jackson* v. *Burlington and Rutland R. R. Co.* (25 Vt. [2 Deane], 162).

If the engine runs over the horse in a highway, the horse not being rightfully there, the railroad company is not liable for the injury, unless it was the result of the gross negligence of the engineer. (Am. L. J., Sept., 1849, 116; *Supreme Ct.*, 1850, *Waldron* v. *Rensselaer and Saratoga R. R. Co.*, 8 Barb., 390; but see

Corwin v. *N. Y. and Erie R. R. Co.*, 13 N. Y. [3 Kern.], 42; compare Laws of 1862, 844, chap. 459, § 1.) That for killing an animal which was wrongfully and negligently on defendant's road, no action lies. (4 Comst., 349; *Supreme Ct.*, 1862, *Staats* v. *Hudson River R. R. Co.*, 23 How. Pr., 463.) The grounds and extent of the duty imposed by the general railroad act, of maintaining fences, explained. (*Staats* v. *Hudson River R. R. Co.*, 3 Keyes, 196; S. C., 33 How. Pr., 139.)

Cattle, on land of a third person, adjoining a railroad, passed through the gate of the farm crossing, left open by the owner of the land, upon the track, and were killed. *Held*, that the corporation was not liable. (*Supreme Ct.*, 1852, *Brooks* v. *N. Y. and Erie R. R. Co.*, 13 Barb., 594; approved and followed, *N. Y. Com. Pl.*, 1853, *Halloran* v. *N. Y. and Harlem R. R. Co.*, 2 E. D. Smith, 257.) That this case is not an authority for holding plaintiff's negligence, or the fact that the cattle were trespassing on the adjoining lands, a defense, see *Ct. of Appeals*, 1855, *Corwin* v. *N. Y. and Erie R. R. Co.* (13 N. Y. [3 Kern.], 42), and other cases cited, *infra*.

In the above case of Brooks, the company was held not liable for injuries to animals resulting from their entering upon the track through a gate left open without the fault of the company, at a part of the road properly fenced and guarded, although another portion of the road is not fenced. After the requisite fences and cattle guards have been duly made and maintained, as required by Laws of 1850, chap. 140, § 44, a railroad company is no longer absolutely liable for all damages to stray animals, but can be charged only upon the ground of negligence. And a person sustaining such damages by reason of the negligence of a corporation, cannot recover if his own negligence in any way concurred in causing it. (*Ct. of Appeals*, 1863, *Hance* v. *Cayuga and Susquehanna R. R. Co.*, 26 N. Y., 428.)

In the last case of *Hance* (26 N. Y. Rep.), the corporation was negligent in not removing snow which filled up the cattle-guards, so that they made no substantial impediment to the passage of cattle. The owner of the cattle which escaped from the yard on the track, under those circumstances, was held chargeable with negligence, and that he could not recover for the injury, though guilty of no actual negligence in suffering them to escape, though otherwise, if the cattle, being temporarily driven along the highway, had made their way out to the track in consequence of the neglect of the railroad company in not clearing its cattle-guards of snow. Upon reading the opinion of the court at page 432 of this case, it would seem that the case of *Corwin* v. *The N. Y. and Erie R. R. Co.* (13 N. Y., 42), which is cited therein, is not authority for the doctrine imputed to it in the opinion in the *Hance Case*. It was also said that the provision that, when the fences and cattle-guards are not in good repair, the company shall be liable for damages (Laws 1854, chap. 282, § 8), must not be construed literally, since such construction would exclude every consideration of negligence, and would render the company liable in every conceivable case where their fences were not at the time of the injury in proper repair. (*Murray* v. *N. Y. C. R. R. Co.*, 4 Keyes, 274.) See, also, *Terry* v. *N. Y. C. R. R. Co.* (22 Barb., 574), where the plaintiff allowed his horse to run at large in a pasture, between which and the railroad there was no fence, without showing any legal reason or excuse therefor. It was held such carelessness and negligence on his part that, if the horse goes upon the railroad track and is killed, without any willful negligence by the railroad company or its servants, he can

have no remedy against the company. (General Term, 1855.) So, also, a railroad company having an exclusive right to the use of the land taken for its track is not liable for injuries to cattle which stray thereon. Since cattle come there without right, want of care on the part of the corporation is not, in judgment of law, a fault on their part; but if it could be so considered, the plaintiff, having also been in fault, by which he contributed to produce the injury, is not entitled to recover. (4 C. & P., 375; 6 id., 23; 8 id., 373; 9 id., 601; 4 id., 297; 2 Stark., 332; 2 Pick., 621; 12 id., 177; Cro. Jac., 158; 2 Hall, 151; 19 Wend., 399; 1 Cow., 88; Ct. App., 1850, *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. [4 Comst.], 349; and S. C. below, 5 Denio, 255.)

(The facts in the above-cited case of *Munger* v. *The Tonawanda R. R. Co.* transpired prior to the first general railroad act of 1848, and the decision in that case must be considered as having been made in accordance with the principles of the common law upon the ground of the contributory negligence of the plaintiff, untrammeled by the application of this section of the railroad act. [See *Corwin* v. *N. Y. and Erie R. R. Co.*, 13 N. Y., 46. Opinion by Marvin, J.])

To the contrary of the above cases, and holding that the neglect to maintain the proper statutory fences and cattle-guards imposes an absolute liability upon the company irrespective of the question of the negligence of the plaintiff, are the following: A railroad company is liable for injury to cattle straying upon the railroad track, in consequence of their own neglect to maintain fences and cattle-guards as required by the Laws of 1850, 233, § 44, although the plaintiff was not an adjoining proprietor, and it is not shown how or whence the cattle came upon the road. The statute was intended to impose an absolute liability upon railroad companies so neglecting, without reference to mere negligence on the part of the owner of cattle. (2 Eng. L. & Eq., 289; *Ct. of Appeals*, 1855, *Corwin* v. *N. Y. and Erie R. R. Co.* 13 N. Y. [3 Kern.], 42; overruling *Marsh* v. *N. Y. and Erie R. R. Co.*, 14 Barb., 364; where negligence of the owner was held a defense.) The fact that a third person, who was an adjoining owner, had covenanted with the company to maintain the fence, and that his breach of the covenant was the reason that the fence was down, is no defense for the company. (*Id.*)

In the above case it was said by Denio, J., that the design of the section is to require the railroad companies to enclose their track within substantial fences, and to guard it by the ditches called cattle-guards from the approach of animals wandering on the highways, and that the method prescribed for securing that object is the provision charging the company with damages for all injuries done to animals when they have disregarded the statute; and, moreover, that it is not material from whence, or under what circumstances, the animals cross upon the track, provided they are able to get there by the absence of fences or cattle-guards. Justice Marvin, in the same case, says the railroad company cannot raise the question when they have omitted to make fences, whether the cattle were *lawfully* upon the adjoining close, having failed to perform the duty required by the Legislature, they are, by the plain language of the statute, liable "for all damages which shall be done by their agents or engines to cattle or other animals thereon." So, also, in *Bradley* v. *Buffalo, N. Y. and Erie R. R. Co.* (34 N. Y., 427), the court, citing the above case of *Corwin* v. *N. Y. and Erie R. R. Co.*, said it is no excuse that the cattle, horses, etc., were at large in violation of law.

And also in an action against a railroad company for the value of a colt killed by a train on the road, it was proved that the colt entered the road through a gap in the fence made by a trespasser, but left unrepaired by the company for one or two weeks; that the colt then walked along the track until that crossed the highway, when it jumped the cattle guard and ran along the track. *Held*, 1. That the fact of gap having been made by a trespasser was no defense to the action; the company ought to have repaired it. 2. That the other facts constituted no defense. 3. That the negligence of the plaintiff in suffering his colt to run at large was no defense, the defendants having neglected their duty under the statute. (*Laws of* 1859, 233, § 44; see 3 N. Y., 42; *Supreme Ct.*, 1859, *Munch* v. *N. Y. Central R. R. Co.*, 29 Barb., 647.) So also the company is absolutely liable for injuries to cattle entering upon the track through a defect in the fence or cattle guard, which it has neglected to repair (*McDowell* v. *N. Y. Central R. R. Co.*, 37 Barb., 195), even where such defect was the act of a trespasser. (*Munch* v. *N. Y. Central R. R. Co.*, 29 Barb., 647.)

See also, to the effect that the liability is an absolute liability, *Shepherd* v. *Buffalo, etc., R. R. Co.* (35 N. Y.), where it was held that, under the provision of the railroad law of 1850, as amended 1854 (chap. 282, § 8), railroad companies are required to fence both sides of their track, and are liable for damages done to cattle, so long as such fences are not made and kept in good order; and it is no answer to object that a plaintiff, who sues for injury to his cattle, was guilty of negligence in turning his cattle into the field when he knew there was no fence. (*Ct. of Appeals*, 1866, *Shepard* v. *Buffalo, etc., R. R. Co.*, 35 N. Y., 641.) It is do defense that the party whose cattle were killed was legally bound to build such fence, under a covenant between his assignor and the company. It was the duty of the company to see the fence built, and failing in that they are liable. (*Idem.*) In the above case of Shepard, at the end of the opinion it is stated that it had been declared otherwise in the case of *Pohler* v. *N. Y. C. R. R. Co.*, 16 N. Y., 476, which see, *infra*.

The more recent utterances of the Court of Appeals indicate that the law of this State is, that the corporation is absolutely liable for a noncompliance with the provisions of the statute, irrespective of acts of negligence on the part of the owner of the animals. It has been held that, while it is the primary duty of a railroad company to discover and repair defects in fences, gates, etc., which it is bound to maintain, it is the duty of the adjoining proprietor interested in their security to give notice to the company when a defect has come to his knowledge; which of the parties must be charged with negligence must ordinarily be left to the discretion of the jury upon the circumstances of the particular case. *Pohler* v. *N. Y. Central R. R. Co.*, 16 N. Y., 476.)

However, in regard to the decision in *Pohler* v. *N. Y. Central R. R.* (16 N. Y., 476), cited above, the same principle would seem to be involved that was held in the Corwin case (13 N. Y., 42, *supra*), that the obligation to fence was an imperative puty, and that the contributary negligence of the plaintiff was not a valid defense, and see *Shepard* v. *Buffalo, etc., R. R. Co.* (35 N. Y., 646), holding that the company is liable for damages done to cattle, so long as the fences are not made and kept in good order, and at the close of the opinion in that case stating that it had been decided otherwise in the Pohler case (*supra*).

The omission to fence does not, however, render the company liable for injuries to its employees on the train. The duty, under Laws of 1850, 233, is one in respect to the owners of such animals only, and the liability prescribed is all

that is incurred by a violation of it. Railroad companies are not bound, as to its servants, to erect and maintain fences on the sides of the roads, so that they can be held liable for injuries to their own servants in consequence of their omission to fence. (*Supreme Ct.*, 1855, *Langlois* v. *Buffalo and Rochester R. R. Co.*, 19 Barb., 364.)

In the absence of a legislative provision, making the erection of the fences, etc., an absolute duty to the public, the courts cannot properly impose such erection as a duty, and hold its non-performance to be negligence *per se*, disregarding all other circumstances. The liability prescribed by the section is all that is incurred by a violation of the provisions.

There is no obligation imposed upon the railroad company so far as its servants employed upon its engines are concerned, to erect and maintain fences on the line of the road, so as to render the corporation liable for an injury to a servant thus employed in consequence of its neglect to fence against cattle. (*Id.*)

The provisions of the act are for the benefit of owners and occupants of land and owners of animals contiguous to the road, and for the protection of the traveling public. (*Corwin* v. *N. Y. and Erie R. R. Co.*, 13 N. Y., 42; *Shepard* v. *Buffalo, etc., R. R. Co.*, 35 id., 641; *Suydam* v. *Moore*, 8 Barb., 358; *Walton* v. *Rensselaer and Saratoga R. R. Co.*, id., 390; *Staats* v. *H. R. R. R. Co.*, 3 Keyes, 196; S. C., 33 How. Pr., 139; *Tracy* v. *Troy and Boston R. R. Co.*, 38 N. Y., 433; *Brace* v. *N. Y. C. R. R. Co.*, 27 id., 269.)

To render the company liable under the statute for killing animals escaping through a railroad fence temporarily out of repair, actual or constructive notice of such want of repair must be brought to the company, and its neglect to repair within a reasonable time be shown. (*Wheeler* v. *Erie Railway Co.*, 2 Sup. Ct. [T. & C.], 634; see *McDonell* v. *N. Y. C. R. R. Co.*, *infra*.)

The owner of cattle is not deprived of the benefit of the statute by his pasturing cattle in a field of his own, adjoining the railroad, although he knows it to be unfenced. (*Shepard* v. *Buffalo, etc., R. R. Co.*, *supra*.) The corporation is liable only for animals entering upon the track at a place which the company is bound to fence, and the fact that a portion of the fence is defective, is immaterial where the animal entered at another place. (*Brooks* v. *N. Y. and Erie R. R. Co.*, 13 Barb., 594.) These requirements of the statute are by no means the measure of the company's care or conduct in the transportation of passengers. The railroad must comply with these provisions, but it cannot therefor neglect other necessary and proper precautions. (*Brown* v. *N. Y. Cent. R. R. Co.*, 34 N. Y., 404.) Where a breach is made in the fence or cattle-guard, and suffered to remain an unreasonable length of time, the company is absolutely liable for injuries to cattle entering through the gap. (*McDonell* v. *N. Y. Cent. R. R. Co.*, 37 Barb., 195; see *Wheeler* v. *N. Y. Cent. R. R. Co.*, *supra*.)

That a railroad company is not necessarily liable for damages arising through a defect in the fencing of the track, where the defect is recent or temporary, and there has been no neglect on the part of the company. (See *Murray* v. *N. Y. Cent. R. R. Co.*, 4 Keyes, 274.) The fences and cattle-guards must be maintained. This duty to keep in repair requires vigilance to ascertain defects, and energetic application of the means necessary to make the repairs, as soon as the defects are discovered. (*Id.*) The fact that a gap was made by a trespasser will not excuse the company, nor does it make any difference that the agent of the company was ignorant of such defect. (*Munch* v. *N. Y. Cent.*

R. R. Co., 29 Barb., 647.) Under a plea that the injury complained of was occasioned by the neglect of the company to construct cattle-guards only, a recovery cannot be had for an omission to build fences. (*Parker* v. *Rensselaer, etc., R. R. Co.*, 16 Barb., 315.)

If the fence is for the most part maintained, but is defective in a particular place, the owner of the injured cattle must offer proof that they entered through such defective part. Evidence that the animal entered upon the railroad track, over or through a fence which the company was bound to maintain, should be submitted to the jury; but not so evidence that possibly the animal entered through the breach. The plaintiff should be non-suited where there is no evidence that the animal escaped upon the track in the manner alleged. (*Morrison* v. *N. Y. and New Haven R. R. Co.*, 32 Barb., 568.)

Where sheep and a heifer were killed, and it was shown that the part of the fence where the sheep escaped was known to the company to be out of repair before the escape, but there was no evidence that the fence was out of repair when the heifer escaped before the escape; *held*, the company was liable for the sheep, but not for the heifer. (*Wheeler* v. *Erie Railway Co.*, 2 Supr. Ct. [T. & C.], 634.)

Liability for injury to cattle-gate being negligently left open. (*Spinner* v. *N. Y. Cent. R R. Co.*, 2 Hun, 421.) Liability for injuring cattle in consequence of neglect to fence (*Brady* v. *R. and S. R. R. Co.*, 1 Hun, 378), even though the owner was negligent. (*Rhodes* v. *Utica, etc., R. R. Co.*, 5 Hun, 344; *Sheaf* v. *Utica and B. River R. R. Co.*, 2 Supr. Ct. [T. & C.], 388; *Fanning* v. *Long Island R. R Co.*, 2 id., 585.)

Negligence cannot be imputed to a person simply from the fact that his beasts have escaped from his well-fenced field on to the railroad track. (*Spinner* v. *N. Y. Cent. R. R. Co.*, 67 N. Y., 153.)

§ **205.** *Provision as to fences and cattle-guards extended to all railroads.*—Every railroad corporation, whose line of road is open for use, shall, within three months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, before the lines of such railroad are opened, erect and thereafter maintain fences on the sides of their roads, of the height and strength of a division fence, as required by law, with openings or gates or bars therein at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads, and shall also construct, where the same has not already been done, and hereafter maintain cattle-guards at all road crossings, suitable and sufficient to prevent cattle, horses, sheep and hogs from getting on to such railroad. And so long as such fences and cattle-guards shall not be made, and when not in good repair, such railroad corporation and its agents shall be liable for damages which shall be done by the agents or engines of any such corporation to any cattle, horses, sheep or hogs thereon; and when such fences and guards shall have been duly made and shall be kept in good repair, such railroad corporation

shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence, within the provisions of this section; but no railroad corporation shall be required to fence the sides of its roads, except when such fence is necessary to prevent horses, cattle, sheep and hogs from getting on the track of the railroad from the lands adjoining the same. (*Laws* 1854, *chap.* 282, § 8.)

The latter part of section 8 of chapter 282 of the Laws of 1854, probably refers to rivers or lakes through whose borders the railroad might run, or where high rocks or other obstructions would render it unnecessary to fence against cattle (*Shepard* v. *Buffalo, etc., R. R. Co.*, 35 N. Y., 641). The Hudson River Railroad Company is not required to erect fences where the said railroad is constructed in the river or under circumstances whereby it is inaccessible to cattle. (Laws 1846, chapter 216, § 24.) By the charter of the Hudson River Railroad Company, the corporation are relieved from any obligation to maintain fences where their railroad is constructed in the river, and this exemption is not changed or removed by the provisions of the general railroad act of 1848. (*Ct. of Appeals*, 1863, *Schermerhorn* v. *Hudson River R. R. Co.*, 38 N. Y., 103.)

§ **206.** *Agreement by land owner to maintain fence.*— But it shall be the duty of every owner of land adjoining any railroad, who has received, or whose grantor has received a specific sum as compensation for fencing along the line of land taken for the purpose of said railroad, and has agreed to build and maintain a lawful fence on the line of said road, to build and maintain such fence; and if said owner, his heir or assign, shall not build said fence within thirty days after he has been notified so to do by the said railroad corporation, or shall neglect to maintain said fences, if built, said corporations shall build and thereafter maintain such fence, and may maintain a civil action against the person so neglecting to build or maintain said fence, to recover the expense thereof. (*Laws* 1854, *chap.* 282, § 9.)

A. made an oral agreement with a railroad company, for valuable consideration, that he would maintain the fences along his own land; he neglected it for six years and then through defect in the fences his own cattle got upon the track and were killed. *Held*, that he could not recover. If the plaintiff is in fault, he can maintain no action, even if the other party is guilty of blame. (5 C. & P., 375; 6 id., 53; 4 id., 106; 8 Barb., 390, 358,368; 3 M. & W., 244; 8 Man. & Gr., 114; 5 Den., 255; affirmed, 4 N. Y., 349; *Supreme Ct.*, 1852, *Talmadge* v. *Rensselaer and Saratoga R. R. Co.*, 13 Barb., 493.)

If the doctrine of this case is to be considered as based upon the fact that the plaintiff's contributory negligence in not erecting the fence which he had agreed to build caused his cattle to be wrongfully on the defendant's road and thus bar a recovery against the company, that doctrine is overruled by the cases of *Corwin* v. *N. Y. and Erie R. R. Co.* (13 N. Y., 42), *Bradley* v. *Same* (34 N. Y., 427), and *Shepard* v. *Buffalo, etc., R. R. Co.* (35 N. Y., 641), which held that

the obligation of the company to erect and maintain the fences an imperative duty not affected by the question of the plaintiff's contributory negligence.

One who has covenanted with a railroad company to keep fenced, as required by statute, a strip of land bought of him by the company for part of their track, cannot, nor can an occupant under him, maintain an action for injury to animals, under the general railroad act of 1850 (*Laws of* 1850, *chap.* 233), caused by the insufficiency of such fence. (*N. Y. Com. Pl.*, 1859, *Duffy* v. *N. Y. and Harlem R. R. Co.*, 2 Hilt., 496.) Where, under the conditions on which the company acquired their title to the land, the adjoining owner was bound to maintain fences—*Held*, that after the fences had been burned by sparks from the locomotive, the company were not under such an obligation to rebuild, as to be liable to him for injuries to cattle which escaped on to the track. (*Supreme Ct*, 1855, *Terry* v. *N. Y. C. R. R. Co.*, 22 Barb., 574.)

A contract between an owner of land and a company, that the latter should "construct and maintain good and sufficient fences on each side of the track, and also two crossings for teams," and making no provision for gates—*Held*, not to relieve the company from its statutory obligation to maintain gates. *Ct. of Appeals*, 1857, *Poler* v. *N. Y. C. R. R. Co.*, 16 N. Y. [2 Smith], 476.

If the landowner refuses to have cattle-guards erected, or undertakes, with the company, to erect them himself, the omission of the company to perform the duty imposed by the statute is not wrongful; for the provision of the statute is for the benefit and protection of the landowner. Hence, in such case, a tenant of the landholder cannot recover for an animal killed in the absence of such guards. (*Supreme Ct.*, 1854, *Tombs* v. *Rochester and Syracuse R. R. Co.*, 18 Barb., 583.) The foregoing cases are overruled by the case of *Shepherd* v. *The Buffalo and N. Y. and Erie R. R. Co.* (35 N. Y., 641), where it is held that it is no defense that the party whose cattle were killed was legally bound to build such fence under a covenant between his assignor and the company; that it was the duty of the company to see the fence built, and, failing in that, they were liable; that the company could not be allowed to set up the negligence of the plaintiff, if it may be so termed, when it has itself omitted to fulfill the requirements of the statute, it should not be permitted to set up its own violation of a statute duty as a basis of charging negligence upon others. (See, also, note to § 204, *ante*, in regard to the liability of the company under that section.)

An agreement to erect and maintain a division fence for a valuable consideration, is not, by its terms, an agreement not to be performed within a year; nor is it a special promise to answer for the debt, default or miscarriage of another. It does not fall within any of the cases where the contract is required to be in writing. (*Talmadge* v. *R. and S. R. R. Co.*, 13 Barb., 493.)

§ **207.** *Lessees of railroads to maintain fences, cattle-guards, etc.*—And when the railroad of any railroad corporation shall be leased to any other railroad company, or to any person or persons, such lessee shall maintain fences on the sides of the road so leased, of the height and strength of a division fence, as required by law, with openings, or gates, or bars therein, at the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroads, and shall also construct, where the same has not

already been done, and hereafter maintain cattle-guards at all road crossings, suitable and sufficient to prevent horses, cattle, sheep and hogs from getting on to such railroad. And so long as such fences and cattle-guards shall not be made, and when not in good repair, such lessees and their agents shall be liable for damages which shall be done by the agents or engineers of any such corporation, to any cattle, horses, sheep or hogs thereon; and when such fences and guards shall have been duly made, and shall be kept in good repair, such lessee shall not be liable for any such damages, unless negligently or willfully done. A sufficient post and wire fence of requisite height shall be deemed a lawful fence within the provisions of this section; but no lessees of a railroad corporation shall be required to fence the sides of said roads except when such fence is necessary to prevent horses, cattle, sheep and hogs from getting on to the track of the railroad, from the lands adjoining the same. (*Laws* 1864, *chap.* 582, § 2.)

A railroad corporation which has parted with the possession and control of its road under a lease thereof to another corporation, containing a covenant that the lessee shall keep up the fences, is not liable to one traveling upon the highway for damages resulting from the omission of the lessee to repair a fence which was in good order at the time of the lease and surrender of possession. (*Dichett* v. *S. D. and P. M. R. R. Co.*, 67 N. Y., 425.) Provisions of statute in regard to fencing does not apply to travelers on highway. (*Id.*) As to whether the lessor of a railroad, who has parted with possession, can be held liable for the negligence of the lessee under the statute in question in a case where it does not apply, *quære.* (*Id.*)

A railroad corporation organized under the general railroad act has no authority to lease its road to an individual, or if it does so, it remains liable for injuries caused by the negligence of those operating it. The act of 1864, cited in the text, does not confer the power to lease, but applies only when such power has been conferred. (*Abbott, Adm'r, etc.*, v. *J. G. and K. Horse R'way Co.*, 80 N. Y., 27.)

CHAPTER 13.

LIABILITY OF THE COMPANY FOR LABOR PERFORMED IN CONSTRUCTING ITS ROAD.

§ 207. The liability of the company.
§ 208. Notice to be given by laborer.
§ 209. Contents of notice.
§ 210. Notice, how served.
§ 211. Limitation for bringing action.
§ 212. Mechanic lien laws applicable to railroad bridges and trestle work.

§ 207. *Liability of company.*— As often as any contractor for the construction of any part of a railroad, which is in progress of construction, shall be indebted to any laborer for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. (*Laws* 1850, *chap.* 140, § 12, *as amended by Laws of* 1871, *chap.* 669, § 2.)

The intent of this section is to provide for the payment of laborers employed by contractors, in contradistinction to section ten of the same act, which provides for the payment of the immediate servants and employees of the company. (*Gallagher* v. *Ashby*, 26 Barb., 143. See section 105, *ante.*)

In the construction of the charter of the Hudson River Railroad Company, which contained a similar provision, the court said the important leading words in the act are "*contractors*" and "*laborers.*" "By the first I think we are to understand all such persons as assume to perform a specified portion of the work, and that too whether such persons have contracted with the defendants or with other persons who have contracted with the defendants. In other words, I think the word '*contractors*' as used in the act is to be understood to embrace all who employ '*laborers*' in the construction of the work, whether they be original or sub-contractors. So too I think the word '*laborers*,' in contradistinction to the word '*contractors*,' is intended to indicate such persons as upon the employment of contractors actually engage in the construction of the work; he who is employed to superintend others who are engaged in the actual labor of constructing the road is as much a laborer, within the meaning of the statute, as those whom he superintends." (*Warner* v. *Hudson River R. R. Co.*, 5 How. Pr. R., 456.)

To charge a railroad company with liability for the indebtedness of a contractor to his laborer, under the above cited section 12 of the general railroad act, the indebtedness must arise from services personally performed by the laborer. Accordingly, when an action was brought against a railroad company

in the manner provided by that section to recover for the services of plaintiff's servant and team, rendered upon defendant's road for a contractor constructing a portion thereof, the claim was disallowed. (*Cummings* v. *N. Y. and Oswego M. R. R. Co.*, 1 Lans., 68; see also *Atcherson* v. *Troy and Boston R. R. Co.* [cited in the last case], 6 Abb. Pr. [N. S.], 329)

The indebtedness of contractors to laborers, for which the company may be held liable, by notice, under section 12 of the general railroad law (*Laws of* 1850, *chap.* 140), which gives laborers a remedy against the company for demands on contractors, is only such indebtedness as accrues from the personal labor of the claimant (perhaps including that to which by law he is entitled, such as that of a minor child), with implements used by him for which no extra charge is ordinarily made. (*Ct. of Appeals*, 1850, *Atcherson* v. *Troy and Boston R. R. Co.*, 6 Abb. Pr. [N. S.], 329.)

A laborer, employing his own teams and an assistant, under an agreement therefor with the contractors, cannot recover against the company for the services of the teams or the assistant; nor can he recover even for his own personal services, unless, perhaps, where his agreement for his own services was separate. (*Id.*)

If the laborer has so dealt with the contractor that any portion of an entire demand is not within the statute, then his remedy is against his employers upon their contract alone. (*Id.*)

A. contracted with the defendants for the construction of a part of their railroad. B., by an agreement with A., contracted to do a portion of the work, and employed the plaintiff as a laborer thereon. *Held*, that B. was a contractor within the meaning of the act, and the plaintiff could maintain an action under it against the company. (*Ct. of Appeals*, 1855, *Kent* v. *N. Y. C. R. R. Co.*, 12 N. Y. [2 Kern.], 628; approving *Warner* v. *H. R. R. R. Co.* [*Sup. Ct., Circuit*, 1851], 5 How. Pr., 454; and overruling *Millered* v. *Lake Ontario, Auburn and N. Y. R. R. Co.*, 9 id., 238.)

§ **208.** *Notice to be given by laborer.*—Such notice shall be given by said laborer to said company within twenty days after the performance of the number of days' labor for which the claim is made. (*Laws* 1858, *chap.* 140, § 12, *as amended by Laws* 1871, *chap.* 669, § 2.)

§ **209.** *Contents of notice.*—Such notice shall be in writing, and shall state the months and particular days of the month upon which labor was performed and remains unpaid for, the price per day, the amount due, with the name of the contractor from whom due, the section of the road performed, and shall be signed by such laborer or his attorney, to which notice an affidavit shall be annexed, made by such laborer or his attorney, to the effect that of his own knowledge the statements contained in such notice are in all respects true. (*Laws* 1850, *chap.* 140, § 12, *as amended by Laws* 1871, *chap.* 669, § 2.)

§ **210.** *Notice, how served.*—Such notice so verified shall be served on an engineer, agent or superintendent employed

by said company, having charge of the section of the road on which such labor was performed, personally or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. (*Laws* 1850, *chap.* 140, § 12, *as amended by Laws* 1871, *chap.* 669, § 2.)

§ **211.** *Limitation for bringing action.*—But no action shall be maintained against any company, under the provisions of this section, unless the same is commenced after ten and within thirty days after notice is given to the company by such laborer as above provided. (*Laws of* 1850, *chap.* 140, § 12, *as amended by Laws* 1871, *chap.* 669, § 2.)

The original section 12 of the general railroad act, previous to its amendment, read as follows: "As often as any contractor for the construction of any part of a railroad, which is in progress of construction, shall be indebted to any laborer, for thirty or any less number of days' labor performed in constructing said road, such laborer may give notice of such indebtedness to said company in the manner herein provided; and said company shall thereupon become liable to pay such laborer the amount so due him for such labor, and an action may be maintained against said company therefor. Such notice shall be given by said laborer to said company, within twenty days after the performance of the number of days' labor for which the claim is made. Such notice shall be in writing, and shall state the amount and number of days' labor, and the time when the same was performed, for which the claim is made, and the name of the contractor from whom due, and shall be signed by such laborer, or his attorney; and shall be served on an engineer, agent or superintendent employed by such company, having charge of the section of the road on which such labor was performed, personally, or by leaving the same at the office or usual place of business of such engineer, agent or superintendent, with some person of suitable age. But no action shall be maintained against any company under the provisions of this section, unless the same is commenced within thirty days after notice is given to the company by such laborer as above provided." (*Laws of* 1850, *chap.* 140, § 12.)

§ **212.** *Mechanic Lien laws applicable to railroad bridges and trestle work.*—The provisions of the laws relating to mechanics' liens heretofore passed shall apply to bridges and trestle work erected for railroads and materials furnished therefor, and labor performed in constructing said bridges, trestle work and other structures connected therewith, and the time within which said liens may be filed shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work and structures connected therewith, or the time from which said materials shall have been delivered. This act shall apply to all uncompleted work commenced previous to the passage of this act. (*Laws* 1870, *chap.* 529, § 1.)

CHAPTER 14.

GENERAL LIEN LAW FOR RAILROAD EMPLOYEES.

§ 213. Lien upon track and appurtenances.
§ 214. Notice to be filed.
§ 215. Evidence on trial.
§ 216. Action to enforce lien.
§ 217. Lien to continue one year.
§ 218. Priority of liens.
§ 219. Liens, how discharged.
§ 220. Personal liability of stockholders, etc.

§ **213.** *Lien upon track and appurtenances.*—Any person who shall hereafter perform any labor for a railroad corporation shall, on filing with the county clerk of any county in which such railroad corporation is situated, or through which the road of such corporation passes, the notice prescribed by the second section of this act, have a lien for the value of such labor upon such railroad track, rolling stock and appurtenances, and upon the land upon which such railroad track and appurtenances are situated to the extent of the right, title and interest of such railroad corporation in the property existing at the time of filing the said notice. (*Laws* 1875, *chap.* 392, § 1.

§ **214.** *Notice to be filed.*—Within thirty days after the performance and completion of such labor, such person shall file a notice, in writing, with the county clerk of the county where the property is located, specifying the amount of claim, and the corporation against whom the claim is made. The county clerk shall enter the particulars of such notice in a book to be kept in his office, to be called the "lien docket," with the name of claimant, amount claimed, the name of such corporation against which such claim is made, and the date of the filing of the notice, hour and minute. A fee of ten cents shall be paid to said clerk on filing such lien, and said notice, when so filed, shall thereafter operate as an incumbrance upon said property. (*Laws* 1875, *chap.* 392, § 2.)

§ **215.** *Evidence on trial.*—Any person performing labor, in availing himself of the provisions of this act, shall, upon the trial, or at the assessment of damages, produce

evidence to establish the value of such labor, and that the same was performed for such railroad corporation. (*Laws* 1875, *chap.* 392, § 3.)

§ **216.** *Action to enforce lien.*—Any laborer performing any work, or assignee thereof, may, after such labor is performed, and the service of the notice required by the first section of this act, bring an action in any of the courts of the county in which said property is situated to enforce said lien, requiring such railroad corporation to appear, by attorney, within thirty days after such service and answer the same, or, in default thereof, the claimant may take judgment for the amount of claim and costs. (*Laws* 1875, *chap.* 392, § 4.)

§ **217.** *Lien to continue one year.*—Every lien created under the provisions of this act shall continue until the expiration of one year, unless sooner discharged by the court or some legal act of the claimant in the proceedings; but when a judgment is entered therein, and docketed with the county clerk within said year, it shall be a lien upon the real property of the railroad corporation against whom it is obtained, to the extent that other judgments are now made a lien thereon. (*Laws* 1875, *chap.* 392, § 5.)

§ **218.** *Priority of liens.*—The liens created and established by virtue of the provisions of this act shall be paid and settled according to the priority of the notice filed with the county clerk, as directed by the second section hereof. (*Laws* 1875, *chap.* 392, § 6.)

§ **219.** *Liens, how discharged.*—All liens created by this act may be discharged as follows:

1. By filing with the county clerk a certificate of the claimant, or his successors in interest, acknowledged or proved in the same manner as a conveyance of real estate, stating that the lien has been paid or discharged; or

2. By depositing with the court or clerk of the court a sum of money equal to double the amount claimed, which money shall be thereupon held subject to the determination of the lien; or

3. By an entry of the county clerk, made in the book of liens, that the proceedings on the part of the claimant have been dismissed by the court in which it is brought, or a judgment rendered against the said claimant; or

4. By an affidavit of the service of a notice from such railroad corporation, or its attorney, to the claimant, requiring such claimant to commence an action for the enforcement

of said lien within twenty days after service of said notice, and the failure of said claimant to commence an action as aforesaid. (*Laws* 1875, *chap.* 392, § 7.)

§ **220.** *Personal liability of stockholders, etc.*—Each and all the stockholders of such 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 stockholders 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 a right to recover the same of the other stockholders in such corporation in ratable proportion to the amount of the stock they shall respectively hold with himself. (*Laws* 1875, *chap.* 392, § 8.)

See notes to § 105, *ante*, in regard to last section.

See Laws 1870, chap. 529, § 1, making mechanics' lien laws applicable to bridges and trestle work (§ 212, *ante*).