

IN THE  
CIRCUIT COURT OF THE COUNTY OF ESSEX

OF THE THIRTIETH DAY OF SEPTEMBER,

IN THE YEAR ONE THOUSAND EIGHT HUNDRED AND FIFTY-SIX.

ESSEX COUNTY, ss: The Central Railroad Company of New Jersey were summoned to answer Levi Hetfield, Jr. of a plea of trespass, and thereupon the said plaintiff, by Parker and Keasbey his attorneys, complains, for that the said defendants on the first day of May, in the year of our Lord one thousand eight hundred and fifty-six, and on divers other days and times between that day and the commencement of this suit, with force and arms, &c., broke and entered a certain close of the said plaintiff, situate in the Township of Plainfield in the County of Essex, and then and there, with shovels, pick-axes, and other instruments, dug up, 10 turned, and subverted the earth and soil of the said close of the plaintiff, and then and there put, placed and laid, and caused and procured to be put, placed and laid, in and upon said close, divers large quantities of sleepers, ties, beams and pieces of wood, and also divers large quantities of iron rails; and put, placed and laid upon and across the said close of the plaintiff, divers railroad tracks, cars, trucks and engines, and kept and continued the same in and upon the said close, without the leave or license, and against the will of the said plaintiff, for a long space of time, to wit, from the respective times of putting, placing and laying the 20 same as aforesaid, until the commencement of this suit, and thereby and therewith, for and during those respective times greatly incumbered the said close, and hindered and prevented the said plaintiff from having the use, benefit and enjoyment thereof, to wit at Plainfield aforesaid.

And also for that the said defendants on the first day of May, in the year eighteen hundred and fifty-six, with force and arms, &c., broke and entered a certain other close of the plaintiff, situate in the township of Plainfield aforesaid, and then and there ejected, expelled, put out and amoved the plaintiff from the pos- 30 session, use, occupation and enjoyment of his said last mentioned close, and kept and continued him so ejected, expelled, put out and amoved for a long space of time, to wit, from thence hitherto, whereby the said plaintiff, for and during all that time, lost, and



was deprived of the use and benefit of his said last mentioned close, to wit, at Plainfield aforesaid; and other wrongs to the said plaintiff, then and there did, against the peace of this State, and to the damage of the plaintiff, two thousand dollars. And therefore he brings his suit, &c.

ESSEX COUNTY, ss: And the said The Central Railroad Company of New Jersey, by Frederick T. Frelinghuysen, their attorney, come and defend the force and injury, when, &c., and say that they are not guilty of the said supposed trespasses above laid to their charge. or any part thereof, in manner and form as the said plaintiff hath above thereof complained against them, and of this they put themselves upon the Country, &c.

TO PARKER & KEASBEY, *Attorneys of Defendant,*

SIRS:

Please take notice that under the Plea of the general issue, the Defendant will give in evidence that "The Elizabeth Town & Somerville Rail Road Company," were duly incorporated under and by virtue of a law of the State of New Jersey, entitled "An Act to incorporate the Elizabeth Town and Somerville Rail Road Company" passed February ninth, eighteen hundred and thirty-one, and that the said Company was duly organized under the said Act of Incorporation; and that the said Company by the said Act were authorised to construct a railroad from Somerville to Elizabeth Town, passing as near as practicable through Plainfield, said road not being more than sixty-six feet wide, with as many sets of tracks as the said Company might deem necessary, and when the route of the said road should be surveyed, and the survey thereof deposited in the office of the Secretary of State, then it was by the said Act made lawful for the said Company to enter upon, take possession of, hold, have, use, occupy and excavate such lands and erect embankments and all other works necessary to lay rails and do all other things which should be suitable or necessary for the completion or repair of the said road, Provided, that the payment, or tender of the payment, of all damages for the occupation of the lands through which the said railroad should be so laid out, be made before the Company or their agents enter upon or break ground on the premises; that the route of the said railroad was so located over the grounds, where the said supposed trespass took place, said location being made by means of a central line run through a track or width for track of sixty-six feet wide, and after the said survey and location was made and many years prior to the commencement of this suit the said railroad was constructed on the said lands in question by the said "The Elizabeth Town and Somerville Rail Road Company;" and will further prove that the taking and occupation of the said lands and the damages by reason thereof were paid and satisfied and settled for at the time of such taking, and that no claims for any damages



for the occupation of the said lands has existed since the Company so took possession of the same.

And that the Somerville and Easton Railroad Company was incorporated under an act of the Legislature of this State, entitled "An Act to Incorporate the Somerville and Easton Railroad Company," and was duly organized thereunder, and that the said "The Somerville and Easton Railroad Company" were by an Act entitled "A Supplement to an Act entitled An Act to Incorporate the Somerville and Easton Railroad Company, passed February twenty-sixth, eighteen hundred and forty-seven," duly authorised to purchase the said Railroad of the said "The Somerville and Elizabeth Town Railroad Company" and did so, and the said "The Somerville and Elizabeth Town Railroad Company" and did so, and the said "The Somerville and Easton Railroad Company" was by the Act last aforesaid, authorised on effecting the said purchase, to assume and take the name of "The Central Railroad Company of New Jersey," which they did, and are the defendants in this suit, and are invested with all the rights of both "The Elizabeth Town and Somerville Rail Road Company" and "The Somerville and Easton Rail Road Company:" and that the said lands where the said supposed trespass took place, are now in the lawful use, occupation and possession of these defendants, and have been in the use, occupation and possession of the said "The Elizabeth Town and Somerville Railroad Company," and of the said "The Somerville and Easton Rail Road Company," and of these defendants, under and by virtue of the said Acts of the Legislature of New Jersey aforesaid, for more than twenty years before the commencement of this suit.

FRED'K T. FRELINGHUYSEN,

*Attorney of Defendants.* 30

Therefore let a Jury thereupon come before the Judge aforesaid at Newark aforesaid, on the first Tuesday of October next, who neither, &c., to recognise, &c., because as will, &c., and the same day is given to the parties here, &c.

At which day before the Judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their Attorney, and the Sheriff hath not sent here the writ to him in this behalf delivered, nor hath he done anything thereupon.

And afterward, that is to say on the twelfth day of January, A. D., eighteen hundred and fifty-eight, to which day the issue as aforesaid joined, had been continued from term to term before the Judge aforesaid, at Newark aforesaid, come the parties aforesaid, by their attorneys aforesaid, and the jurors of the Jury of whom mention is before made, being summoned also come, who to speak the truth of the matter within contained, being chosen, tried and sworn, say upon their oath that the said defendants are guilty in manner and form as the said plaintiff has above thereof complained against them, and they assess the damages of the said plaintiff at twenty-five dollars, and so they say all.

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## ESSEX CIRCUIT COURT.

LEVI HETFIELD, JR.

vs.

THE CENTRAL RAILROAD COMPANY  
OF NEW JERSEY.} *In Trespass.*  
} *Bill of*  
} *Exceptions.*

This cause came on to be tried at the term of January, in the year 1858, and the plaintiff, to prove the issue on his part, offered and read in evidence, a Deed of Conveyance from William C. Ayres and wife to the plaintiff, bearing date the fifth day of March, in the year eighteen hundred and fifty-one, for a tract or lot of land in the village of Plainfield, in Essex County, beginning at a stone in the middle of Third street, thence along the middle of Third street two chains and eighty-two links to a stone in the line of Zachariah Webster; thence along his line South forty-seven degrees and thirty minutes, East two chains, ninety-eight and a half links to a stone in Laing Webster's line; thence with his line and Benjamin Steele's South Westerly two chains, eighty-four links to a stone corner of Ephraim Drake's land; thence along his line North Westerly two chains, ninety-eight and a half links to the place of beginning. (*Pro ut* the said Deed.)

Isaac S. Dunn, a witness for the plaintiff, says: I am a surveyor; I have surveyed the premises contained in the foregoing Deed, and made a Map thereof, and of the contiguous premises. (Witness produces the Map, which is offered in evidence, *pro ut* the same.) The witness explained the Map and by his testimony it appeared that the premises in question were a lot (parcel of the lot described in the above deed) about sixty-seven feet in front on Third street, and about two hundred feet deep lying on the South East side of Third street; that it was bounded on the South West by a lot also fronting on Third street, belonging to Perrine & Randolph, which separated it from Mechanic street; that Mechanic street crosses Third street at right angles, and the said lot of Perrine & Randolph is about seventy-five feet wide on Third street; that the Railroad of defendants is located in and through Third street, in front of the lot in question, and for some distance each way therefrom.

The said witness further testified among other things that the distance from the nearest rail of the railroad to the front of the lot is 15 feet 8 inches. It was admitted that the suit was commenced September 12th, 1856.

The plaintiff having rested, the desendants offered in evidence, First, The original Survey of the Elizabethtown and Somerville Railroad, filed in the Office of the Secretary of State, October 4, 1836, (*pro ut* the same), which was read.



James Moore being sworn, says, I was formerly Engineer of the Elizabethtown and Somerville Railroad Company; I surveyed the road in Plainfield; the road was surveyed and located through Third street—the centre of the street; the survey was filed in the Secretary of State's Office.

(The above mentioned survey being shown to witness, he says,) That is the survey. The road was built to Plainfield in 1837, beyond that in 1838; I knew Jacob A. Wood; he lived just beyond this depot lot.

- 10 The defendants' counsel here offered and read in evidence the records of the following Deeds of Conveyance:

1. A Deed from James Wilson to Thomas Osborne Scudder, bearing date July 31, 1835, for a lot in Plainfield described as being marked lot No. 10, on a Map of twenty-two lots laid out in said Village, on a street to be called Third street, beginning at a stone in the middle of said Third street, (which stone was also a corner of lots Nos. 4, 5 and 11 on said Map,) and was also in the middle of the street to be opened as a continuation of Mechanic street, and from thence running (1) along the middle of Mechanic street South forty-seven and a half degrees, East two chains ninety-eight and a half links to a stone in line of James Wilson's; thence (2) along that line North forty five degrees, East one chain, sixty-eight links to a stone, being corner of lot No. 9 on said Map; thence along said lot No. 9 North forty-seven and a half degrees, West two chains, ninety-eight and a half links to a stone in the line of Randolph Dunham's land; thence along the same, South forty-five degrees, West to the beginning. This Conveyance was made as therein stated under the express reservation and condition, and not otherwise, that one and a half rods of said lot where it joins Third street, and one and a half rods where it joins Mechanic street, should be left open to make, with as much from lots on the opposite side, a public road or highway forever, of three rods wide, both for Third street and Mechanic street.

2. A Deed from James Wilson to Alfred Berry and Alexander Dunham, bearing date the 31st day of July, 1835, for another lot in Plainfield, described as being marked No. 9 in the same Map, adjoining the lot above described, beginning at a stone in the middle of Third street, and also being a corner of the lot above described, and thence running along the middle of Third street North Easterly one chain, sixty-eight links to another stone in the middle of Third street, a corner of a lot of Wm. Tunison, (viz: the lot next described); thence along said Tunison's line South Easterly two chains ninety-eight and a half links; thence South Westerly one chain, sixty-eight links to said lot No. 10; thence along the same North Westerly two chains, ninety-eight and a half links to the beginning. The description of said lot is followed in said last mentioned Deed by the following clause: "under the express condition and reservation of leaving open one



and a half rods on Third street for the half of a public street or highway, three rods in width for ever, and not otherwise."

3. A Deed from James Wilson to Wm. Tunison, dated July 31st, 1835, for another lot in Plainfield, being described as marked No. 8 on the said Map, beginning at a stone in the middle of Third street and corner of Berry and Dunham's lot (last above described); thence running along the middle of Third street North Easterly one chain, fourteen and three-fourths links to a stone in the line of lands of Reuben Ayres; thence along the same South forty-seven and a half degrees, East two chains, 10 ninety-eight and a half links to a stone in line of lands of said James Wilson; thence South Westerly along the same one chain, twenty and a half links to a stone corner of said Berry and Dunham's lot; thence along the same, North Westerly two chains, ninety-eight and a half links to the beginning, "under the express condition and reservation of leaving open one and a half rods on Third street, for the half of a public street or highway, three rods in width forever, and not otherwise."

4. A Deed from Zachariah Webster to the plaintiff Levi Hetfield, Jr., together with Isaac Coddington and John Herbert, 20 bearing date May 26, 1854, for a lot adjoining the lot No. 8, last above described as beginning in the Southerly line of Third street at the line of Boice and Thickston's lot; thence along the Southerly line of said street South Westerly two chains, sixty-six links to the line of other lands of Levi Hetfield (namely, the said lot No. 8); thence along his line South forty-seven and a half degrees, East one chain, eighty-nine links; thence North Easterly two chains, sixty-six links to D. I. Boice's line; thence along his line North forty seven and a half degrees, West one chain, eighty-nine links to the beginning; containing one-half an acre, and is part of 30 the Reuben Ayres tract, "upon the condition and reservation that sixty-five links in width of said lot on Union street be left open for a street; and that Levi Hetfield, Jr. leave of his land adjoining twenty three links wide for said street to be kept open forever for a public highway as it now is, and granting to Levi Hetfield, Jr. all the right, title and interest of the said Webster to the lands lying in front of the lot hereby conveyed to the middle of Third street, subject however to the occupancy of the Central Railroad Company.

5. A Deed from Thomas Osborn Scudder and wife to Jacob A. 40 Wood, bearing date June 5th, 1843, for lot No. 10, above described, with the same condition and reservation relating to the street as contained in the above mentioned Deed from James Wilson to said Scudder.

6. A Deed from Alfred Berry and Alexander Dunham to James C. Ayres, bearing date May 10th, 1836, for lot No. 9, above described, with the same condition and reservation with regard to the street as contained in the above stated Deed from James Wilson to said Berry and Dunham.

7. A Deed from Wm. Tunison and wife to James C. Ayres, 50



bearing date May 10th, 1836, for lot No. 8, above described, with the same condition and reservation with regard to the street as contained in the Deed from James Wilson to said Tunison, as above stated.

8. A Deed from James C. Ayres and wife to Firman Walker and Daniel W. Ayres, bearing date May 12th, 1836, for lots Nos. 8 and 9 above described, with the same reservation and condition as to the street, as last referred to.

9. A Deed from Firman Walker and Daniel W. Ayres and  
10 their wives, to Jacob A. Wood, bearing date September 1st, 1836, for lots No. 8 and 9, above described, with the same conditions and reservation with regard to the street as last stated.

10. A Deed from Jacob A. Wood and wife to Ephraim Drake, bearing date September 27th, 1844, for lots No. 8, 9 and 10, above described, with the same condition and reservation as last stated.

11. A Deed from Ephraim Drake and wife to Wm. C. Ayres, bearing date July 13th, 1848, for lots No. 8 and 9, above described.

12. A Deed from Wm. C. Ayres and wife to the plaintiff, Levi  
20 Hetfield, Jr., bearing date March 5th, 1851, for said lots No. 8 and 9, above described. (This Deed is the same with the Deed put in evidence by the plaintiff.)

13. A Deed from the plaintiff, Levi Hetfield, Jr. and his wife to Levi Hetfield, Jr., (same man) Israel Coddington and John Herbert, bearing date January 17th, 1855, for a part of said lots No. 8 and 9, to wit, of lot No. 8, and part of lot No. 9, adjoining No. 8, the whole tract conveyed being one chain, eighty links in width on Third street, and running back with that width the whole length of the lots, (leaving one chain, two links in width  
30 in the plaintiff, which is the *locus in quo*.) It is expressed in this Deed that the grantor (the plaintiff) does not warrant and defend the intrusion or extension over that part of the land now conveyed, now called Third street, that is or may be made by the Central Railroad Company.

(*Pro ut* the said Deeds, or the record thereof, or a certified copy of the same.)

Having produced and read in evidence the foregoing Deeds, the several lots and trects therein conveyed and described were located and identified by the witness, Isaac S. Dunn, on the Map  
40 made by him as aforesaid; whereby it appeared that the *locus in quo*, was a part of lot No. 9, above described; and that Jacob A. Wood owned the property in question from the first day of September, 1836, to the twenty-seventh day of September, 1844, and was in possession of the same.

And thereupon the examination of the witness, James Moore, was proceeded in as follows: The Counsel for the defendants asked the witness if he knew whether Jacob A. Wood consented to the location of the railroad through the centre of Third street at the time of the location thereof in October, 1836. To this  
50 inquiry the Counsel for the plaintiff objected as calling for irrele-



vant and unlawful testimony. Thereupon the Charter of the Elizabethtown and Somerville Railroad Company, passed February 9, 1831, was offered in evidence, and the 6th Section thereof read by the defendants' Counsel, and the said question was again repeated, and objected to by the Counsel for the Plaintiff, and the said question was overruled by the Judge, to which ruling the Counsel for the defendants excepted.

The defendants' Counsel then offered to prove by the witness that Jacob A. Wood, after the first of September, 1836, and when the Elizabethtown and Somerville Railroad Company located their railroad through the centre of Third street, in Plainfield, and proceeded to lay the same there, consented thereto. To which evidence the Counsel for the plaintiff objected, and the Judge overruled the same, to which ruling the Counsel of the defendants excepted.

The Counsel of the defendants then called Zachariah Webster as a witness, and asked him whether the property in Third street, including the lot in question, is damaged or benefitted by the railroad being there. To which question the Counsel for the plaintiff objected, and the Judge overruled the same, to which ruling the Counsel of the defendants excepted.

The counsel for the defendants then put to the witness the following question: Did the owners of the property on Third street, and the owners of the property in question, acquiesce in the railroad being laid there, when it was first laid? Which question being objected to, the Court overruled the same as calling for immaterial testimony, to which ruling the Counsel for the defendants excepted.

The Counsel for the defendants then asked the witness thus: Did the owners of property on Third street, and Jacob A. Wood among the number, continue to acquiesce in the railroad being located through Third street, from the time the location was first made to the year 1844, when Wood sold out the property in question? (The Counsel of the defendants explaining at the same time that the question was put for the purpose of showing the continued acquiescence of the property owners in the location of the railroad.) This question also being objected to by the plaintiff's Counsel, was overruled by the Judge, to which ruling the Counsel of the defendants excepted; and upon these their said several exceptions, the Counsel of the defendants prayed that their Bill of Exceptions might be sealed, and it is sealed accordingly.

(It was admitted by the plaintiff, by his Counsel, that the defendants, the Central Railroad Company, are purchasers of the Elizabethtown and Somerville Railroad Company, so far as they are authorised to be such by law, and the several acts of the Legislature, passed in relation to the said Companies respectively, were considered as evidence in the case.)

I hereby certify that the above are truly the Exceptions taken by the defendants on the trial of this cause, and I hereby seal the same accordingly.

D. HAINES. [L. S.]



The Plaintiffs in Error in the Supreme Court made no formal assignment of errors.

After argument, the following decision was rendered :

NEW JERSEY SUPREME COURT.

June Term, 1861.

|    |                                                                                    |   |                                                     |
|----|------------------------------------------------------------------------------------|---|-----------------------------------------------------|
| 10 | THE CENTRAL RAILROAD COMPANY<br>OF NEW JERSEY,<br><i>vs.</i><br>LEVI HETFIELD, JR. | } | <i>Error to<br/>Essex County<br/>Circuit Court.</i> |
|----|------------------------------------------------------------------------------------|---|-----------------------------------------------------|

This cause having been argued at the last term of this Court, by Messrs. Frelinghuysen and Bradley, for the plaintiffs, and C. Parker, for defendant, and the Court having advised thereon, it is ordered that the Judgment of the Circuit Court be reversed, and that a *venire de novo* do issue.

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| 20 | On motion of<br>F. T. FRELINGHUYSEN,<br><i>Attorneys of Plaintiffs in Error.</i> |
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Whereupon a Writ of Error was taken by Levi Hetfield, Jr., the original plaintiff, removing the judgment of Supreme Court into this Court.

30 COURT OF ERRORS AND APPEALS.

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|----|-------------------------------------------------------------------------------------|---|--------------------------------------------------------|
| 30 | LEVI HETFIELD, JR.,<br><i>vs.</i><br>THE CENTRAL RAILROAD COMPANY<br>OF NEW JERSEY. | } | <i>In Trespass.<br/>On Error to the Supreme Court.</i> |
|----|-------------------------------------------------------------------------------------|---|--------------------------------------------------------|

And the said plaintiff comes by Parker & Keasbey, his attorneys, and says that in reversing the judgment aforesaid, there is manifest error in this, that the said judgment was reversed in the Supreme Court, whereas by the law of the land, the said judgment ought to have been affirmed; therefore in that there is manifest error. And the said plaintiff prays that the said judgment of reversal so given, may be reversed, annulled and altogether holden for nought, and that the judgment of the said Circuit Court, in and for the County of Essex, may in all things be affirmed, and that he may in all things be restored, &c.

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| 50 | The Common Joinder is filed by<br>F. T. FRELINGHUYSEN, <i>Att'y.</i> |
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## OPINIONS OF THE JUDGES.

NEW JERSEY SUPREME COURT.

June Term, 1861.

THE CENTRAL RAILROAD COMPANY  
OF NEW JERSEY.

*vs.*

LEVI HETFIELD.

} *Errors to*  
} *the*  
} *Essex Circuit.*

THE CHIEF JUSTICE. This was an action of Trespass by Hetfield against the Central Railroad Company for breaking and entering his close in Plainfield, and building thereon a railroad in May, 1856, and ejecting the plaintiff from his close and keeping him out of possession.

The *Pleas* were the general issue and another setting out in detail that the road was many years before built under authority of the charter of The Elizabethtown and Somerville Railroad Company, to whose rights the Defendants claim to have lawfully succeeded. The notice does not claim that any deed was given for the lands or right of way by the then land-owner or any award made under the charter; but states that the land and damages were settled and paid for at the time of the taking of the land. 10

At the trial, the plaintiff proved his title to the *locus in quo*, which was a part of the public street in front of his lot, called Third street, in Plainfield, and that the railroad is located in that street and across the lands included in his deed of conveyance.

The Bill of Exceptions shows no evidence offered by the plaintiff or defendants of any alteration of the railroad track after it was first laid. The map which was put in by the plaintiff showed that the plaintiff's lot extended to the middle of the street, and two railroad tracks, one of which was between the centre of the street and the plaintiff's boundary on the street, and the other upon the opposite side of the centre line of the street. No evidence in the cause shows any more laying of track after October, 1838, when the road was extended from Plainfield to Somerville, it having been completed to Plainfield in 1837. 20



The defendants showed the survey of the road by which it appeared that it was located through Third street, the centre of the street. The engineer who made the survey also testified to that fact.

As the case stands upon the Bill of Exceptions it must be assumed that the trespass relied upon to sustain this case was the use and occupation of the road as it was constructed in 1838.

At that time Jacob A. Wood was the owner of lot 9, which is the *locus in quo*. The plaintiff acquired his title in 1851 from  
10 Wm. C. Ayres and wife, who acquired his by mesne conveyance from Jacob A. Wood.

Several Bills of Exceptions were sealed at the trial.

The defense offered to show that Jacob A. Wood consented to the location of the railroad through the centre of Third street at the time of the location thereof in October, 1836, and also that after the location and after the 1st of September, 1836, the said Wood consented to the laying of the road there; also that Wood acquiesced in this railroad being laid through Third street where it was first laid; also that Wood continued to acquiesce in the  
20 railroad being laid there from the time it was first laid until 1844, when he sold the property in question.

All these offers were overruled by the Court and the Bill of Exceptions sealed.

These Bills present for determination two points:

(1.) Was the evidence offered competent for the purpose of showing that the continuance of the railroad track over the *locus in quo* and its continued use by defendants was not tortious as against the plaintiff?

(2.) Was it competent for the purpose of showing a right of pos-  
30 session of the *locus in quo* under the charter of the defendants?

As to the first point, the question is not whether the evidence was competent in answer to the action, but whether under this issue made by the pleadings it could be received.

The pleas were not guilty and a permanent right of possession acquired by payment of the value of the land and damages, according to the provisions of the charter.

Under the plea of not guilty, any evidence showing that no trespass had been committed, that is, no entry had been made upon the plaintiff's land by the defendant, was competent. All  
40 matter admitting the trespass in fact to have been committed must be specially pleaded.

Bac. Abdg't, Tit. Trespass, I. Gen. issue.

Co. Litt. 282 b.

Badkin vs. Powell, Cowp. 478.

Chit. on Pleading, 493, 539.

2 Camp. 378, 9.

Rawson vs. Morse, 4 Pick. 127.

Waters vs. Lilley, do. 147.

1 Philip Ev. 134, 3d ed.

50 3 Stark Ev. 1462.



2 Saund. Pl. & Ev. Leave and License.  
Bennet vs. Alcott, 2 T. R. 166.

If the defendants had offered to show that they laid the track by permission of the plaintiff, the evidence would not have been admissible under the general issue. The license of the former owner could not for the same reason be admitted under the issue. It admitted the apparent trespass upon the plaintiff's land, but sought to justify it by evidence of authority to do the act or continue the railroad as it was built.

I was at first inclined to think that the evidence was admissible upon the ground that as the evidence showed that the original entry was lawful, the defendants could not be treated as trespassers without a notice from the plaintiff of its revocation; but, upon further reflection, I am satisfied this view of the case cannot be supported. The same reason that requires the plea of license when given by the plaintiff, requires it when given by a former owner of the land under whom the plaintiff claims 10

Lord Abinger in Wallis vs. Harrison, 4 Mee. and Welsbey, 543, held that in such a case a party who does that which is *prima facie* a trespass, ought to make his excuse good by averring want of notice of transfer of the property by his licensor. That would put in issue what is a material part of the justification. 20

The defendants were *prima facie* trespassers. They were bound to show by special plea a right to be there during the acts complained of." I am not willing to go the length of that case and hold that the conveyance of the land by Wood so completely revoked the license as to make the defendants trespassers. It is true, as Lord Abinger says, that a person who does an act upon land not his own is bound to know the true owner. His ignorance of that is no excuse. If A. gives B. permission to hunt upon his land and then conveys to C., and A. afterward continues to hunt as before, I see no excuse for B. to say that he did not know of the transfer when sued for trespass by C. The license conveys no interest in the land, nor does it charge or encumber it. 30

But where B. by A.'s permission erects a temporary building upon the land or a railway, it would be hard at the instant the title to land passed by deed, to convert the lawful occupation into a trespass. 20

When an occupant of lands is sued in trespass by the lawful owner, he must avoid the trespass by showing his authority to be there, either from the present or former owner of the land. This he must do by special plea. His defense is license, not title. By this defense he can claim no right to remain; his right is to remove upon notice of revocation, without being treated as a trespasser; if he does so, a mere license to enter upon land, uncoupled with an interest, may be revoked at the will of the party by whom it was given. 40

A right to come and remain for an indefinite time on the land of another can be granted only by deed, and a parol license to do so is revocable at any time although money be paid for it, and 50



even if money has been expended upon the faith of it in erecting buildings or any other permanent structure or improvements.

Wood vs. Lord Wilter, 13 Mee. and Welsbey 838.

Miller vs. Auburn & Syracuse Railroad Co. 6 Hill, 64

Cook vs. Stearns, 11 Mass. 533.

Ruggles vs. Lesure, 24 Pick. 190.

Prince vs. Case, 10 Crown, 395.

11 Metcalf, 251. Stevens vs. Stevens.

I am of the opinion that the evidence was not competent under  
10 the pleadings to support the defense of license.

II. As to the second point :

Was it competent to show a right of possession under the charter? This aspect of the case is not embarrassed by any question of pleading.

The principles already discussed are conclusive as to this point. in one view of it. The defendants must maintain themselves, not upon the common law, but by virtue of some peculiar provision of their charter in derogation of it.

By the charter it was provided that when the survey of the  
20 road should be deposited in the office of the Secretary of State, it should be lawful for the said Company to enter upon, take possession of, have, hold, use, occupy and excavate such lands and erect embankments and all other works necessary to lay rails and to do all other things which should be suitable or necessary for the completion or repair of the said road, Provided that the payment or tender of payment of all damages for the occupation of the lands through which the said railroad should be so laid out, be made before the Company or their agents enter upon or break  
30 ground on the premises, except for the purpose of surveying or laying out the said road or roads, unless the consent of the owner or owners of such lands be first had and obtained.

The question to be considered on this part of the case is not as to what power the Legislature might have granted to the corporation untrammelled as they then were by constitutional restrictions. But what did they grant? It is certain that the power granted was not coextensive with the power of the State to take private property for public uses.

Keeping in view this fact, it is obvious that the object of these  
40 provisions could not have been to vest in the Company the permanent title or possession of the land needed for the railroad; both the modes mentioned are inappropriate for the purpose.

The section gives to the corporation the power which otherwise as a corporation they could not have had, to do all things necessary for making and repairing the road, entry upon, embankments and excavations of lands included. The proviso was intended only to limit the power previously conferred, except as to preliminary surveys, to cases where payment or tender of payment for lands and damages had been made or the consent of the landholder had been given. Its office was to limit the exercise of the  
50 conferred power to certain cases, not to declare the mode in which title should be acquired or the power exercised.



The words of the proviso require not that payment or tender of payment shall be made or consent be given before the title to the land or the rights of permanent possession for railroad purposes shall pass to the company, but before they shall enter or break ground in the premises. It is a limitation on the right to take possession, not a mode described of acquiring title.

The proviso declares the Company shall not take possession *before* consent or payment, but *after*.

This is made very clear by the next section; for as the last had not prescribed any mode by which the damages were to be 10 ascertained or the consent given, this proceeds to point out the modes; which are an agreement with the owner of the land for the use or purchase thereof, or an ascertainment by commissioners of the value of the lands and damages, who are to be appointed in a particular mode prescribed by the act.

The reports with a description of the land are to be filed in the Clerk's office of the County, and the act declares that the report shall at all times be considered as plenary evidence of the right of the Company *to have, hold, use, occupy and possess and enjoy* the said lands. 20

When the Legislature uses terms of known signification in the law, it is presumed they use them in that sense. The provisions of the statute of frauds as to the conveyance of interest in lands, will not be held to be repealed by implication, unless the act can have no other sensible construction.

What an agreement for the use of the land permanently, or the purchase thereof is, the act does not define. It leaves that to the general law of the State. In the absence of all direction to the contrary, it must be such an agreement as would bind the owner.

If the act had used the word deed, it would have been no more 30 definite than it now is. It says, if the land cannot be purchased, commissioners must be appointed and the title acquired in that way. If it *can* be purchased it *must* be. A legal purchase of land can be made by *deed* only.

Again, by the last section, entry cannot be made to build the road until the damages have been paid or tendered. What damages? Manifestly not such as the Company may offer, although they may be abundant, but such as may be found by the commissioners. Again, what consent? The answer is obvious. Such consent as is provided for in the next section, a purchase of the 40 lands.

It is obvious that neither of the sections can be executed without the other. The Company may take possession by consent or payment of the damages. Nobody disputes but that if not agreed to, the damages to be tendered must be ascertained by commissioners under the next section. No mode in which consent shall be given is prescribed by the first section, but is by the second. How then can it be said the act is silent as to the mode of assent? That is untrue in fact.

The consent spoken of is not such a one as would bar an action 50



of trespass, but such as would convey the title or right of possession. No legislative provision was necessary to give force to a verbal license that would protect the entry on common law principles, as we have already seen.

The case of *Den vs. The Morris Canal Company*, 4 Zab. 587, relied upon by the defendant's counsel furnishes no guide to the construction of this act. By the terms of that charter three modes of obtaining compensation for the land taken and damages sustained were provided.

10 (1) By agreement with the land-owner.

(2) By action against the Company after they have taken the land and done the damage, to recover not for a trespass but compensation for the injury sustained. *Kough vs. Darcey*, 6 Halst. 241.

(3) By assessment, award and payment.

The act on its face authorised an entry upon and taking of the land, subject to such compensation to be made therefor, as was thereafter directed. In the case in 4 Zab. just cited, it was held that this referred to all modes of obtaining compensation, as well  
20 by action as the other modes. The remedy by action could not be had until after the injury done. This act clearly provides that the compensation shall precede the injury.

I am not able to perceive any reason why the requirement of the statute of frauds should not extend to a case of purchase mentioned in the act as well as all other purchases.

The defendants cannot avail themselves of the equitable doctrine of acquiescence as a defense in this case as argued by the counsel, or repose upon that of part performance of a contract to convey.

30 We are in a court of law, and the defendants must shew a legal title or right of possession.

The plaintiff has not stood by and seen the defendants erect valuable buildings under a mistake as to the boundary line between them or even of their legal rights to the land without making a claim. All of which have been held in equity to estop the party from asserting a right which he concealed when he was bound to speak.

It is a case where the defendants have chosen to rely upon a parol settlement or consent insufficient in law for their protection.  
40 They were bound to know the law. There was no element of fraud in the case out of which to frame an equitable or legal estoppel.

The case of *Ludlow vs. The New York and Harlem Railroad Company* relied upon by defendants is not at all analogous to this case. That was a case where it was held that a forfeiture of a deed had been waived by a waiver of performances of a condition to build a fence within a limited time.

The evidence offered was not competent in any aspect of the case, was properly overruled and the judgment ought to be  
50 affirmed.



VREDENBURGH, J. This is an action in trespass for entering on the 1st May, 1856, upon the plaintiff's land and laying a railroad track on it. The plea is not guilty, with notice that the Elizabeth and Somerville Railroad Company was incorporated on the 9th of February, 1831, and were thereby authorised to construct their road with as many sets of tracks as they might deem necessary, and that when the route should be surveyed and the survey deposited in the office of the Secretary of State, it would be lawful for them to enter upon, take possession of, hold, have, use, and occupy said lands, and do all things necessary regarding said road, provided, payment or tender of all damages be made before entry; that the route of said road was located over the *locus in quo* sixty-six feet wide, and that the road many years before the suit was constructed thereon, and that the damages were paid and satisfied at the taking, and that the Somerville and Easton Railroad Company was incorporated, and by act passed February 26, 1847, were authorised to purchase the first named road and so did, and thereby were invested with all the rights of the Elizabeth and Somerville Railroad Company, and that the said Company had had possession over twenty years. 10

It is not questioned but that the Somerville and Easton Company succeeded to and held all the rights in this regard, that the Somerville and Elizabethtown Company had. The rights of the parties therefore are under the old and not under the new Constitution. 20

What were the rights therefore of the Elizabethtown and Somerville Railroad Company? These are prescribed by their charter, (Pamphlet 1831, pages 81-86). The power granted to them is to construct a railroad between the termini, passing as near as practicable through Plainfield, not exceeding sixty-six feet wide, with as many rails as they may deem necessary. 30

These are the powers granted. It is not complained that this road is not between the termini, or as near Plainfield as practicable nor exceeding sixty-six feet wide, nor with more tracks than they deem necessary. The complaint is not that the Company have exceeded their powers. The Legislature under the old Constitution by virtue of their power of eminent domain would have had a right to have constructed this road themselves without compensation, in the same way and for the same reason that they would have had the power to lay a tax. This power they delegated to the Railroad Company with power, when the route was determined on and the survey thereof deposited in the office of the Secretary of State, to take possession of and hold said lands with the consent of the owner, or without consent upon tender of damages. It appears by the case that the road was worked and built in 1837, and that one Wood was then the owner, who, in 1844, sold to the plaintiffs. On the trial the defendants offered to prove that they had the parol consent of Wood to work and build their road where they did. 40

This evidence was overruled by the Court upon the ground 50



that the consent should have been in writing. But the statute does not require the consent to be in writing. The statute of frauds does not apply. That only applies where there is no other statute regulating the matter. This matter is regulated by its own special statute which is governed by its own terms. Nor does the reason of the statute of frauds apply. The Legislature had the power to take without consent or compensation—but saw fit to prescribe that its agents should either get consent or pay. The evidence of either this payment or consent is not prescribed, and  
 10 in either case may be such as satisfied the tribunal to pass upon it. The misapprehension of the plaintiff is that the defendants get title by the payment or consent, whereas they get title by virtue of the act, and the determination of the agents of the State to appropriate it, and the lodging the survey in the office of the Secretary of State.

But the defendants cannot lawfully seize the land before payment or consent, and if they do so, they are liable as trespassers. But the land is nevertheless condemned, and the right to use it vested in the agents of the State as long as the public  
 20 user; and the remedy of the owners is an action of trespass. I am not now speaking of the new, but the old Constitution.

This consent therefore spoken of in the charter of 1831, has no analogy to where a person claims right to hold land by leave and license. It is the case where a person in possession gives consent to the person entitled to take possession, and it may be proved directly by verbal consent or inferred from long acquiescence.

There is another corollary which follows from the same principles. Where land is thus seized unlawfully, the whole injury is  
 30 done at the first seizure. The State holds the land, the owner is entitled to its full value. It is seized, if seized at all, for the whole period it is to serve as a public user. The whole injury is to the person who is owner at the first seizure. If a person buys afterward, he buys subject to the public user, and all his rights are subject thereto. There can be no subsequent trespass as against him, and the defendant can defend himself under the general issue without notice. Lands in such cases are seized by the public for great public trusts. This very road has gone on stretching out its arms until it binds together, by ties infinitely stronger  
 40 than its iron bands, the extremities of the continent—in peace, advancing all the highest principles of civilization, and in times of war, liable, like other property, and by the same laws as its battle fields, to be seized by the government,—one of the mightiest elements of national power either for defense or aggression. It never could be tolerated that any private owner could thus, after consent given, sever the sinews of the national strength and lay such immense interests prostrate at his feet. He is entitled to his pay, either from the government or its agents. If its agents enter without consent or payment, he is entitled to vindic-  
 50 tive as well as real damages in trespass, and the whole damage



is by the original seizure and the original owner. It follows that if the defendants seized this land without payment or consent, they are liable to the person who owned the land at the time of the seizure as for a condemnation, and not to any subsequent owner. The plaintiff's grantor therefore if anybody is the one entitled to damages. The right to these damages has not been nor could they be (being a mere chose in action), assigned to the plaintiff. So that whether the defendants took possession originally, rightfully or wrongfully, it is manifest that the present plaintiff has no legal cause of action.

10

Let the Judgment below be reversed.

Mr. JUSTICE OGDEN concurred.

Judgment reversed.







OGDEN, J. This was an action for trespass brought in 1856 for an unlawful entry upon and occupancy of the half-part of a street in the village of Plainfield, in the County of Union, on the line of the route of The Central Railroad Company of New Jersey.

The case before this Court shows that the Railroad was located and built over the *locus in quo* in 1837 or 1838, and has been so used up to the commencement of this suit. That one Jacob W. Wood owned the property from the first of September, 1836, to the 27th of September, 1844, when he sold it to the present plaintiff. That the street called Third street, upon which the Railroad is located and constructed, was an open public highway when the Company entered upon it and was so continued to the present time; and that in purchasing lots facing on the street, the plaintiff by his deed took title to the centre line of the street with full actual knowledge that the ground within the lines of the public highway was occupied by the Railroad Company. Under such circumstances, the plaintiff brought an action of trespass against the Company for an unlawful entry upon and user of his land lying on the one side of the centre line of Third street. 10 20

He proved his title and rested his case; and in defense the Company gave in evidence the charter under which the Railroad was constructed, passed on the 9th of February, 1831, and also the survey and location of the route of the same, made and filed under the provisions of the 6th section of the Act of Incorporation, for the purpose of showing that they are not *trespassers* but were in possession of the land by authority of law, for the purpose of maintaining and working a railroad.

The section referred to in the charter provides that when the route shall have been determined upon and a survey of the same deposited with the Secretary of State, it should be lawful for the Company to enter upon, take possession of, hold, have, use, occupy and excavate any lands covered by it; and construct their road thereon, subject to such compensation as is thereafter provided. If this was the whole section under the decision of this Court as reported in 4 Zabriskie, 587, there would be no doubt of the right of the Company to enter upon the land and construct a railroad before making compensation. But a proviso was introduced in it requiring that before the Company should enter or break ground in the premises, the payment or tender of payment should be made of all damages for the occupancy of lands through which the railroad may be laid out, unless the consent of the owners of the land be first had and obtained. 30 40

The Company in further support of their justification or defense offered to prove by parol testimony the consent of Mr. Wood, being the owner of the land when the road was projected and constructed, that the Railroad Company might take possession and occupy at the time when the road was constructed; and also offered to prove his acquiescence in such use of it during the 50



whole time of his ownership. These offers were objected to by the counsel for the plaintiff and were overruled by the Court.

I think that the offers were both material and competent. The testimony is not within the prohibitions of the Statute of Frauds. If the Legislature had intended that the *only* evidence of a consent should be a *writing signed by the land owner*, they would have said so in direct language. No such kind of evidence is required by the charter which I think ought to regulate us in this case; and the way was open at the trial for the defendants to satisfy  
 10 the Jury, if they could do so, by oral proofs, that the Company entered upon the land, and constructed the railroad and enjoyed the possession thereof for years by the expressed consent and continued acquiescence of the person who then owned the land, during his ownership.

This is a suit in trespass. Unlawful entry and unlawful acts after such entry are the *gist* of the action.

If the entry and occupation complained of will support trespass, an action of ejectment could also be maintained.

The public have acquired valuable rights of travel upon the  
 20 line of the railroad. Mails are carried over it; immense quantities of produce, fuel and other necessities of life are hourly transported over it, and those public rights ought not to be put in peril by such a construction being put upon the charter as might jeopardize the use of a great public thoroughfare, when the landowner who feels injured can have another adequate mode of redress. If the plaintiff is defeated in this suit, he can prosecute the Company in an action *ex contractu*, for such compensation as he may be entitled to recover.

The Company are trustees and the public are *cestui que* trusts  
 30 in a great highway constructed more than twenty years ago, under a power given by the Legislature in the exercise of their right of eminent domain.

Expensive investments have been made by citizens, and valuable improvements have grown up along the line of the railroad since it has been in operation. It would be contrary to public policy, that after the inhabitants of the State have entered upon the enjoyment of the benefits contemplated to result from the construction of a great public improvement, authorised by the Legislature, that the Company who have received and acted  
 40 under the charter, after a part performance of their contract with the State, should have it within their power, by obstinately withholding compensation from a few landholders, to permit a great line of travel to be interrupted and its continuity perhaps seriously impaired.

There was error in overruling the testimony offered by the defendants, and the judgment should be reversed and a *venire de novo* be awarded.