NEW JERSEY COURT OF ERRORS AND APPEALS.

JUNE TERM, 1902.

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ISAAC W. COLES, Plaintiff in Error, vs. THE MIDLAND TELEPHONE AND TELEGRAPH COMPANY, Defendant in Error.	ON ERROR TO SUPREME COURT.

20

BRIEF OF E. A. ARMSTRONG,
of Counsel with Plaintiff in Error.

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The defendant became incorporated by certificate filed January 6, 1900, under the act entitled "An Act to incorporate and regulate telegraph companies," approved April 9, 1875 (Gen. State., p. 3457). This act by amendment has been extended to telephone companies (Gen. Stat., p. 3,461, Sec. 24).

Telephone and telegraph companies prior to 1890 could only use streets or highways by consent in writing of the landowners (See Sec. 9, Gen. Stat., 3457). By the act of June 20, 1890 (Gen. Stat., p. 3,460, Sec. 23) power was given to condemn lands in streets or highways under petition to the Circuit Court.

Chapter 53, of the laws of 1900 (P. L., 1900, p. 79) is entitled "An Act to regulate the ascertainment and payment of compensation for property condemned or taken for public use (revision of one thousand nine hundred)," approved March 20, 1900. Under this act the defendant Company made application to Justice Garrison, of the Supreme Court, who made an order appointing commissions (Case pp. 9-10). A writ of certiorari was thereupon sued out and the proceedings removed to the Supreme Court, which resulted in a judgment confirming those proceedings (See Opinion, Case, pp. 11-13), and thereupon the plaintiff sues out this writ of error.

It is contended on the part of the plaintiff in error, that in the absence of written consent of the landowner, it is now impossible for telegraph or telephone companies to occupy streets or highways.

Section 9, of the Telegraph Act above referred to (Gen. Stat., p. 3458) is as follows:

"That any telegraph company organized by virtue of this act shall have full power to use the public roads or highways in this State, on the line of their route, for the purpose of erecting posts or poles on the same, to sustain the wires and other fixtures, upon first obtaining consent in writing of the owner of the soil."

This was amended by an act, entitled "An Act to amend an Act entitled 'An Act to incorporate and regulate telegraph companies,' approved April ninth, one thousand eight hundred and seventy-five," which amendment was aproved March 19, 1900, being Chapter 50, of the Laws of 1900, p. 74. This took effect July 4, 1900, and is as follows:

"Any company organized by virtue of this act shall have full power to erect, construct, lay and maintain the necessary poles, wires, conduits and other fixtures for its lines upon, over or under any of the public roads, streets and highways, upon first obtaining consent in writing of the owner of the soil to the placing of poles; and through, across or under any of the waters within the limits of this State; and upon, through or over any other land, subject to the right of the owners thereof to full compensation for the same."

We insist that this amendment is so radically different from the old act as to make it a new enactment. (Endlich Interp. Stat., 195-196.) It is not the mere repetition of the existing statute in the amended article. The words, the arrangement of the words and the powers are all different, for the amendment gives the right to go over or under the surface of the street; something that the original made no reference to at all. Beside which, the amendment itself confers powers to go "upon, through or over any other land subject to the right of the owners thereof to full compensation for the same." If it had been intended that streets and highways might be used in spite of the objec-

tion of the owner upon making compensation, why would those divisions of powers have appeared here? The right of eminent domain is a sovereign right and every grant of its use, like all public grants, is strictly construed as against the grantee. "Such grants like all public grants are to be strictly construed."

N. J. Zinc & Iron Co. v. Morris Canal & Banking Co., 17 *Stew.*, 398 (404); *S. C. 2, Dick.*, 598.

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Such legislation is not unusual. Under the General Traction Act, the right of eminent domain is conferred, but that is not construed to affect streets or highways, and a grant of the use of the street or highway is made dependent upon the written consent of one-half of the owners in lineal feet of property fronting thereon.

The Supreme Court in *Nichol vs. Telephone Co.*, 33 *V*r., 156, distinguished as to the taking of lands subject to
20 street easement and other property, and while this Court sustained this judgment (33Vr., 733), did not do so in the same language.

The defendant contends that while procedure under the 23 Section, Gen. Stat., 3460, has been superseded by the 1900 Act, Chapter 53, that the grant of power in the 23 Section is still operative. To say the least of it, it would seem to be exceedingly doubtful, and to quote the language of Vice-Chancellor Van Fleet in N. J. Zinc Co. vs. Morris
30 Canal Co., 17 Stew., 404, "to doubt in such a case is to deny."

There is technical objection also to the petition; it is unsigned by any one for and on behalf of the applying corporation, as required by Section 2 of the Act (P. L., 1900,

p. 80). The affidavit by the oath of the agent of the petitioner is another requirement of the statute, and that is no sufficient signing and presentation of the petition to the Justice by the corporation.

Nor does it in any place in the petition appear that the "proper officers" of this corporation "have determined to acquire" the property in question. This is a prerequisite under the statute. There must be an express determination to acquire each particular piece of property so sought to be taken from the owner without his consent, before it can be done. So far as appears by recitals in the petition, the utmost that the company has ever done is its determination to build and extend its line. How this determination was arrived at does not appear.

E. A. Armstrong,
Counsel for Plaintiff in Error.

NEW JERSEY SUPREME COURT.

ISAAC W. COLES, vs. THE MIDLAND TELEPHONE AND TELEGRAPH COMPANY.	ON CERTIORARI. REASONS.

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The plaintiff in certiorari in the above stated cause hereby assigns the following reasons for vacating and setting aside the proceedings brought up for review in the above stated cause:

1. The Justice to whom the petition was presented in this cause, and who made the Orders herein, was without jurisdiction or authority by law to entertain the same. 20

2. That there was no lawfull right or authority to make the orders brought up for review herein, or to appoint the Commissioners in and by said order designated.

3. The defendant Company became incorporated on the sixth day of January, A. D. 1900, under the act entitled "An act to incorporate and regulate Telegraph Companies," approved April 9th, 1875, (Gen. Stat. p. 3457), and has failed to make application for the appointment of Commissioners as provided by the amendment to said act, approved June 29th, 1890, (Gen. Stat. p. 3460, Sec. 23.) 30

4. The defendant Company has no right to take property without the consent of the owner by reason of of an act entitled "An act to amend an act entitled 'An act to incorporate and regulate Telegraph Companies,' approved April ninth, one thousand eight hundred and seventy-five," approved March 19th, 1900, (Laws 1900, p. 74.)

5. That the defendant Company is not authorized by law to take property under and by virtue of the act entitled, "An act to regulate the ascertainment and payment of compensation for property condemned or taken for use, (Revision of one thousand nine hundred)," approved March 20th, 1900, (Laws 1900, p. 79).

6. That it did not appear before said Justice, nor does it appear in said proceedings brought up for review, that the defendant company by its proper officers, before the filing of said petition, had determined to acquire the property therein described.

7. That it does not appear from said proceedings, nor did it appear before said Justice, that said Company could not ageee with Heulings Lippincott, the mortgagee of the premises.

8. That the petition and orders in this cause do not conform to the statute of this State.

9. That the land proposed to be taken is not being taken for public use.

10. That said proceedings are contrary to the laws and constitution of the State of New Jersey, and are harmful and oppressive to the plaintiff.

E. A. ARMSTRONG,
Attorney for Plaintiff.

NEW JERSEY COURT OF ERRORS AND APPEALS.

Isaac W. Coles vs. The Midland Telephone & Telegraph Company.	On Writ of Error. Condemnation Proceedings. Certiorari, &c.

Defendant Company's points, by D. J. Pancoast, Counsel.

The Midland Telephone & Telegraph Company was incorporated in January, A. D., 1900, pursuant to the provisions of the act of the Legislature of the State of New Jersey, entitled, "An act to incorporate and regulate telegraph companies," approved April 9, 1875, and the acts supplementary thereto and amendatory thereof, as in its petition to Justice Garrison set forth, which act was amended by the supplement of March 11, 1880, Laws of 1880, p. 201, so as to give companies incorporated under it the right of eminent domain. See Turnpike Company vs. News Company, 14th Vroom, p. 381. The said act was further amended by the supplement of June 20, 1890 (see General Statutes, p. 3460, Par. 23), so as in express terms to include telephone companies.

In Duke vs. Central New Jersey Telephone Company, 24th Vroom, 345, the history of telegraph and telephone legislation was reviewed; and it was therein adjudged that a telephone company incorporated under

the act of 1875 possessed the power of condemnation without reference to the supplement of June 20, 1890.

In 1898, June term, the Supreme Court in Nicoll vs. Telephone Company, 33d Vroom, p. 156, justified proceedings by telephone company to condemn the right to use a public highway with its poles and wires under the supplement of June 20, 1890.

The supplement of March 11, 1900, to the telegraph company act of April 9, 1875, Laws of 1900, p. 74, was not intended to take away the right of condemnation which previously existed under the said act of 1875, and its supplements, including the supp'ement of June 20, 1890, Laws of 1890, p. 489.

It is true that the eighth section of the act of 1875 as amended by the supplement of March 19, 1900, confers the power to erect poles in the street "upon first obtaining the consent in writing of the owner of the soil to the placing of poles;" but there is no repealing clause in the supplement to affect the right of condemnation expressly given by the supplement of June 20, 1890, and no reference is made to the said second section as amended. The question then arises, can the two sections, the second and eighth, as amended, stand in the same act? I submit they can. The second section as amended in the clearest terms gives the right of condemnation. The eighth section, as amended, does not refer to the power of condemnation; but prescribes how a telephone company may obtain the right to erect poles in a street without exercising the right of condemnation, namely, by getting the land owner's consent in writing, and also, the consent of the municipal authorities having the control of the streets.

It could not have been the intention of the legislature

by the act of June 19, 1900, to take away from telegraph and telephone companies the right to acquire the use of streets by condemnation. Such a construction would practically nullify the act, contrary to the policy of the legislature expressed in the supplement of March 11, 1880, Laws of 1880, 201, and in the supplement of June 20, 1890, Laws of 1890, 489. In the case of the State, Britton and others vs. Blake, 6th Vroom, 216, it was said: "If two enactments can by any reasonable construction be upheld, the latter will not operate as a repeal of the former."

There is nothing in the point that the company can not present a petition to the court by its attorney, Beebe vs. Beebe Company, 35th Vroom, 498; Reeves vs. First National Bank of Glassboro, 25th Vroom 208; State vs. Passaic County Agricultural Society, 25th V. 260; Crawford vs. Longstreet, 14th Vroom, 325.

The Company desiring to acquire the right to use the highway in question, duly applied to and received the authority to do so from the township, and then duly tried to acquire the right from Coles as owner of the fee, as set forth in the verified petition, and thus brought themselves within the provisions of the act entitled, "An act to regulate the ascertainment and payment of compensation for property condemned or taken for public use," approved March 20, 1900, Laws of 1900, p. 79.

I therefore submit that the writ of certiorari allowed in this matter ought to be dismissed with costs, and that the Supreme Court was right in so adjudging.

June Term, 1902.

D. J. PANCOAST,
Counsel.

MacCrellish & Quigley, Printers, Trenton, N. J.

NEW JERSEY

Court of Errors and Appeals

ISAAC W. COLES, Plaintiff in Error, vs. THE MIDLAND TELEPHONE AND TELEGRAPH COMPANY, Defendant in Error.	In Error.

WRIT OF ERROR.

(*Returnable April 14, 1902.*)

(*Filed May 6, 1902.*)

New Jersey, *ss.*—The State of New Jersey to our Chief Justice and our Justices of our Supreme
[L. S.] Court, Greeting:

Because in the record and proceedings and also in the giving of a judgment in a plaint which was in our said Supreme Court before you, between Isaac W. Cole, plaintiff, and "The Midland Telephone and Tele- 10 graph Company," defendant, on a certiorari issued out of our said Supreme Court, manifest error has been intervened as is said to the great damage of the said Isaac W.

Coles as by his complaint we are informed, and we being willing that the error, if any there be, should in due manner be corrected and full justice be done to the parties in this behalf, do command you that if judgment be thereupon given that you send distinctly and openly, under your seal, the record and proceedings and plaint aforesaid, and all things touching and concerning the same, to our Court of Errors and Appeals before the judges thereof, on the fourteenth day of April next, together with this writ, that the records and proceedings aforesaid be inspected, and we may cause to be further done thereof what of right and according to law ought to be done.

Witness the Honorable William J. Magie, our Chancellor and president Judge of our said Court of Errors and Appeals, at Trenton, this twenty-seventh day of March, A. D. nineteen hundred and two.

GEORGE WURTS,
Clerk.

E. A. ARMSTRONG,
Attorney.

The answer of the Justices of the Supreme Court of the State of New Jersey within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

WM. S. GUMMERE, [L. S.]
C. J.

NEW JERSEY SUPREME COURT,
FEBRUARY TERM, 1902.

ISAAC W. COLES *v.* THE MIDLAND TELEPHONE AND TELEGRAPH COMPANY.	*On Certiorari.* *Affirmance.*

The Court having heard the argument of counsel and inspected the proceedings removed by the writ in this cause and duly considered the reasons filed,

It is ordered that said proceedings be and the same hereby are affirmed with costs. 10

Entered March 19th, 1902.

On motion of

DAVID J. PANCOAST,
Atty.

I, William Riker, Jr., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule made by said court in above-stated cause and entered in the minutes thereof.

In testimony whereof I have hereto set my hand and the seal of said Court, this eleventh day of April, A. D. nineteen hundred and two. 20

[L. S.]

WM. RIKER, JR.,
Clerk.

STIPULATION.

The following is a copy of the stipulation upon which this case was heard by the Supreme Court:

It is agreed and stipulated between E. A. Armstrong, attorney of plaintiff, and D. J. Pancoast, attorney of defendant in the above-stated cause, that instead of printing the writ and return herein, that the matters 30

hereinafter contained shall be stipulated and agreed upon, that is to say:

First. The writ of certiorari allowed June 29th, 1901, returnable and returned July 29th, 1901.

Second. Exhibit "A" heretofore attached is a true copy of the petition as the same is returned into this court, on which the proceedings for the appointment of commissioners was made.

Third. Attached to said petition is a copy of the ordinance therein referred to, passed by the Township Committee of Delaware township, September 12th, 1900; and also a map showing the proposed location of poles, as required by law.

Fourth. That Exhibit "B" is the order made thereon, after due notice and a hearing of the parties according to law.

Fifth. That the defendant company became duly incorporated on the sixth day of January, A. D. 1900, under an act entitled "An act to incorporate and regulate telegraph companies," approved April 9, 1875 (Gen. Stat. 3457).

E. A. Armstrong,
Attorney of Plaintiff.
D. J. Pancoast,
Attorney of Defendant.

EXHIBIT "A."

To the Honorable Charles G. Garrison, one of the Justices of the Supreme Court of the State of New Jersey:

The petitioner, the Midland Telephone and Telegraph Company, respectfully shows unto your Honor as follows:

1. That your petitioner on the 6th day of January, A. D. 1900, duly filed articles of incorporation and became duly incorporated under the act of the Legislature of this State entitled "An act to incorporate and regulate

telegraph companies," approved April 9th, 1875, and the various supplements and amendments thereto, for the purpose of constructing, owning, maintaining and operating a telegraph and telephone line for telegraphic and telephonic communication, commencing at a point on the Hudson river, in the county of Hudson, and continuing thence through the counties of Hudson, Essex, Union, Middlesex, Monmouth, Mercer, Ocean, Burlington and Camden, to a point on the Delaware river, in the city of Camden. 10

2. That your petitioner, under its said charter, has duly constructed and now operates and maintains a telegraphic and telephonic line of poles and wires from Rhode Hall, in Middlesex county, to Pensauken creek, near Riverton, in the county of Burlington; and that having decided to extend its line through the township of Delaware, in the county of Camden, your petitioner duly applied to the legislative body of the said township of Delaware, to wit, the Township Committee thereof, for a designation of the public streets or high- 20 ways in and upon which its posts or poles should be placed, and the manner of placing the same; and the said Township Committee of Delaware township thereupon gave to your petitioner a writing in the form of an ordinance, which was duly passed by the said township committee on the twelfth day of September, A. D. 1900, designating the streets and highways in said township in which your petitioner's posts or poles shall be placed, and the manner of placing the same, and providing that they shall be so located as in no way to interfere with 30 the safety or convenience of persons traveling on or over the said streets or highways so designated; that the streets and highways so designated were as follows: "The Haddonfield and Moorestown road from the northern limits of Delaware township to the southern limits of said township. Also the Whiskey road from the Haddonfield and Moorestown road to the Cooperstown road, thence on Cooperstown road to

Marlton road, thence westerly on Marlton road to the western limits of Delaware township," a copy of which ordinance is hereto annexed as a part of this petition; and that the said ordinance was thereafter duly published according to law.

3. That your petitioner, under its charter, and the ordinance aforesaid, has commenced the construction of telegraphic and telephonic line of poles and wires through the said township of Delaware and is desirous of acquiring such right as may be necessary to perfect its right to construct, maintain and operate a telegraph and telephone line on the southeasterly side of the said Haddonfield and Moorestown road (a public highway in the said township of Delaware designated in the said ordinance as a highway in which your petitioner's posts or poles shall be placed) in front of the adjoining lands and premises owned and occupied by Isaac Coles, whose ownership extends to the center of said road, the southerly side of which premises adjoin the public road known as the Church road, and the northerly side of which premises adjoin the lands of W. T. Lippincott, in accordance with the terms and conditions of the said ordinance, to be used in connection with and as a part of the said line of your petitioner, to consist of thirteen poles of a height not more than thirty-five feet above ground and not more than six feet under ground, and not more than twenty inches in diameter at the surface of the ground and eight inches in diameter at the top, each pole to have attached thereto not more than six cross arms, each not more than ten feet in length, and to be not less than twenty feet above the ground, each for the use of ten telephone and telegraph wires, the said poles to be not more than one hundred and thirty feet apart, and between five and six feet distant from the fence and road line of the said Isaac Coles' land, there being no sidewalk or curb to the said road.

That the map annexed to this petition marked Schedule "A," and which your petitioner prays may be con-

sidered and treated as forming a part thereof, correctly exhibits said road, street and highway adjoining said lands of Isaac Coles, and the situation of said land with reference to said road, street and highway, and the location of each post and pole to be erected on said road, street and highway adjoining said lands, the distance between the posts and poles, and the distance of each post and pole from said fence or exterior line of the said road, street or highway. The location of each of said posts is indicated on said map by small circles numbered from one to thirteen, inclusive; post so indicated in red as number one (1) being forty-seven and one-half (47½) feet northeasterly from the northeasterly exterior line of the highway known as Church road, and post so indicated as number thirteen (13), being sixty-eight (68) feet southwesterly from the southwesterly exterior line of the road shown on said map as abutting the said Coles' property on the northeasterly side. The figures between the circles indicate the distance in feet between the different poles. The figures opposite each circle indicate the distance of the post and pole from the exterior line of the road, street and highway.

4. That the location of the said poles as indicated on said map was duly approved by the Township Committe of said Delaware township, on April 6th, 1901.

5. That the said poles are to be so located as in no way to interfere with the safety or convenience of persons traveling on the said highway.

6. That the said Isaac Coles is the sole owner in fee of the said land to the center line of the said Haddonfield and Moorestown road; and that the only other person who appears to have any interest in the said land and premises is one Hewlings Lippincott, trustee of Lydia Lippincott, who holds by assignment a mortgage for twenty-six hundred dollars covering the land and premises in question, which said mortgage was made by Isaac Coles to Sallie H. Black, and is dated March 15th, 1884, and recorded in the office of the Register of

Deeds of Camden county, in Book 33 of Mortgages, page 447, which said mortgage was assigned by the said Sallie H. Black to Hewlings Lippincott, trustee of Lydia Lippincott, by a deed of assignment dated the 1st day of March, 1887; and that the said Hewlings Lippincott resides in the township of Chester, Burlington county, New Jersey.

7. That the said Isaac Coles resides in the said township of Delaware on the said premises, and is the occupant thereof; and that your petitioner, after due effort, has been unable to agree with the said Isaac Coles as to the just compensation to be made to him for such use of the highway in front of his said land as the petitioner requires.

8. Your petitioner, therefore, respectfully asks your Honor to appoint three disinterested freeholders, residents of said county, commissioners to fix the compensation, if any, to be paid by your petitioner to the said Isaac Coles and the said Hewlings Lippincott, trustee as aforesaid, according to their respective interests in the premises, for the right to construct, maintain and operate its said telegraph and telephone line in manner and form as aforesaid, along the southeasterly side of the Haddonfield and Moorestown road, in front of his said premises adjoining thereto, and to make a just and equitable appraisement of the value of the lands taken for the purpose aforesaid, and an estimate of the amount to be paid by your petitioner for such land and damage as aforesaid, as of the date of the filing of this petition; and to make their report in writing under the hands of such commissioner, or any two of them, and file the same within such time as your Honor may direct, in the office of the clerk of the county of Camden, to remain of record therein, and to do whatsoever else the commissioners so appointed shall be authorized or required by law to do; and that your Honor will fix a day on or before which the report of said commissioners shall be made and filed; and that your Honor will also assign

or order a time and place for the hearing of said petition, and direct notice thereof to be served upon said owner and mortgagee according to law, and direct the mode and manner in which said notice shall be served upon said owner and mortgagee; and that your petitioner shall have such other relief as the nature and circumstances of the case may require and to your Honor may seem meet.

THE MIDLAND TELEPHONE AND
TELEGRAPH COMANY, 10
DAVID J. PANCOAST,
Atty.

STATE OF NEW YORK,
COUNTY OF NEW YORK, } *ss.*
BOROUGH OF MANHATTAN,

Chares D. M. Cole, being duly sworn, on his oath says that he is the superintendent and agent of the said Midland Telephone and Telegraph Company, and that the matters and things set forth in its above petition are true. CHARLES D. M. COLE. 20

Sworn and subscribed before me this 16th day of April, A. D. nineteen hundred and one.

PERCIVAL S. DAVIS,
[L. S.] *Notary Public Kings County,*
Certificate Filed in N. Y. County.

EXHIBIT "B."

In the Matter of the Proceedings by the Midland Telegraph and Telephone Company to Condemn the Right to Use the Moorestown and Haddonfield Road in Delaware Township, Camden County, New Jersey, in Front of Isaac Coles' Land, for Telephone and Telegraph Purposes	*Order, &c.* 30 *Petition, &c.*

The verified petition of the Midland Telegraph and Telephone Company in this matter having been duly

filed in the office of the clerk of Camden county, asking for the appointment of commissioners to assess the damages to Isaac Coles, as owner, and Hewlings Lippincott, trustee for Lydia Lippincott, as mortgagee, for the taking and use of the land of the said Coles for telephone purposes; and due notice having been given of the application, and the matter duly coming on to be heard in the presence of David J. Pancoast, attorney of the petitioner, and E. Ambler Armstrong, attorney of
10 the said Coles, owner, and Lippincott, mortgagee; and the same having been duly considered, and it appearing to me that the application ought to be granted, I hereby appoint Freedom C. Lippincott, Frank J. Burr and Edward Osler, three disinterested freeholders and residents of the county of Camden, where the said land is situated, commissioners to examine and appraise the said land and to assess the damage to the said owner and mortgagee respectively, for the taking and use of the same for telephone purposes, in the manner set forth
20 in the said petition, according to the provisions of the statute in such case made and provided; and I direct that six days' notice in writing be given to each of the said parties of the time and place, when and where, the said commissioners will sit to hear the said parties; and that the said commissioners shall, unless otherwise directed, make and file their report of the assessment in the clerk's office in this court on or before the first day of August next.

C. G. Garrison, *J. S. C.*

30 Dated June 29, 1901.

NEW JERSEY SUPREME COURT,
FEBRUARY TERM, 1902.

OPINION.

(Filed February 24, 1902.)

1. The act of March 19th, 1900 *(P. L., p. 74)*, amending Section 8 of the Telegraph Companies' Act of April 9th, 1875 *(G. S., p. 3457)*, does not inmpair the power granted by the act of March 11th, 1880 *(P. L., p. 201)*, to acquire by condemnation the right to use public roads for poles and wires, in cases where the owner of the soil refuses to consent to such use. 10

2. The act of March 20th, 1900 *(P. L., p. 79)*, designates the procedure to be followed in such condemnation.

3. In such procedure the petition need not be authenticated by the corporate seal; nor need an effort be made to obtain the consent of a mortgagee of the soil, when the owner refuses to consent.

Argued November term, 1900, before Justices Hendrickson and Dixon. 20

Mr. E. A. Armstrong, for prosecutor; Mr. D. J. Pancoast, for defendant.

The opinion of the Court was delivered by

DIXON, J.—The Midland Telephone & Telegraph Company having presented to one of the Justices of this Court a petition for the appointment of commissioners to fix the compensation to be paid the prosecutor and his mortgagee for the right to construct, maintain and operate a telegraph and telephone line along the southeasterly side of the Haddonfield and Moorestown road in Camden county, the fee-simple of which road is owned by the prosecutor, and the justice having accordingly made the appointment, the prosecutor seeks to 30

set aside the proceedings, chiefly because the company has no authority to acquire such a right without consent of the owner of the soil.

The company was incorporated under the Telegraph Companies Act of April 9th, 1875 (*G. S., p. 3457*), section 8 of which authorized companies formed under it to use public roads for their poles and wires upon first obtaining consent in writing of the owner of the soil. By the second section of a supplement approved March 10 11th, 1880 (*P. L. 1880, p. 201*), and an amendment of this section approved June 20th, 1890 (*G. S., p. 3460*), such companies were empowered, in case the owner of the soil refused or was unable to consent, to acquire the necessary right by condemnation, through a petition to the Circuit Court of the county in which the road was situate. An act approved March 19th, 1900 (*P. L., p. 74*), amended section 8 of the original act of 1875, and, in order to do so constitutionally, the entire section as amended was inserted at length in the new 20 enactment, and hence the clause, that companies organized by virtue of the act might use public roads for their poles and wires upon first obtaining the consent in writing of the owner of the soil, was repeated. The prosecutor contends that the legal effect of this re-enactment of the clause is to repeal the power of condemnation granted by the acts of 1880 and 1890.

We think otherwise. There is no inconsistency between these provisions. Both are proper to give the public consent to the use of the public roads; and one 30 provides for supplementing this by the consent of the owner of the soil, the other for supplementing it by making compensation to an owner who will not or cannot consent. Both can stand, and therefore the repeal of either will not be implied.

Moreover, when the Legislature, in amending a section of an existing statute, repeats in obedience to the constitution the provisions which are not changed, it does not thereby re-enact those provisions so as to give them a new force.

McLaughlin v. *Newark, 28 Vroom 298; 29 Vroom 202.*

The next pertinent statute is an act to regulate the ascertainment and payment of compensation for property condemned or taken for public use, approved March 20th, 1900 (*P. L., p. 79*). This neither confers nor withdraws the power of eminent domain, but merely regulates the procedure in its exercise. By force of it, a petition for the condemnation of a right must be presented to a justice of this Court, instead of the Circuit Court as the act of 1880 had required. In conformity with this act the present proceedings were instituted.

Regarding the other objections made by the prosecutor, we think that the law does not require the petition to be authenticated by the corporate seal. The oath of the agent of the company is the statutory verification.

We are also of opinion that the averments of the present petition sufficiently show, "that the proper officers of the corporation have determined to acquire" the right which it is the object of the petition to secure. Verbal conformity is not essential. Nor was it necessary to make any effort to obtain the consent of the mortgagee, when the owner had refused.

The objections made are overruled, and the proceedings under review affirmed, with costs.

NEW JERSEY COURT OF ERRORS AND APPEALS.

ISAAC W. COLES, *Plaintiff in Error,* *vs.* MIDLAND TELEPHONE AND TELEGRAPH COMPANY, *Defendant in Error.*	In Error to Supreme Court.

ASSIGNMENTS OF ERROR.

10 (*Filed May 8, 1902.*)

Afterwards, to wit, on this day, before the judges of the said Court of Errors and Appeals, comes the said Isaac W. Coles, by E. A. Armstrong, his attorney, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, and assigns the following as causes for error:

1st. That by the record aforesaid, it appears that judgment in the form aforesaid was given to the said 20 Midland Telephone and Telegraph Company against Isaac W. Coles, whereas by the laws of the land judgment ought to have been given to the said Isaac W. Coles against the said Midland Telephone and Telegraph Company.

2d. That the Supreme Court in this cause dismissed the writ of ceritiorari heretofore allowed herein and affirmed the order and proceedings thereby brought into the Supreme Court for review, when the said order and proceedings ought to have been set aside and for nothing 30 holden.

3d. That for the reasons given in the Supreme Court all the proceedings reviewed in and by the writ of certiorari in this cause should have been set aside.

4th. That the justices of the Supreme Court who made the order brought up for review by the writ of certiorari, in which judgment was given in this cause, was without lawful authority to make the same and that the same is null and void.

5th. That the acts of the Legislature relied on to support and sustain the order brought up for review to the Supreme Court by the writ of certiorari allowed therein, hereinabove referred to, were unconstitutional and void; that they did not warrant and authorize the proceedings had and taken thereunder and that said order and proceedings should have been set aside.

6th. That the Midland Telephone and Telegraph Company was not authorized by the laws of the State of New Jersey to make the application and obtain the order brought up for review by the said writ of certiorari in this cause, and the proceedings had and taken by it are null and void.

7th. That the said judgment is for divers other reasons contrary to the constitution and laws of the State of New Jersey.

And the said Isaac W. Coles prays that the judgment aforesaid may be reversed, annulled, and altogether for nothing holden, and that he may be restored to all things which he has lost by occasion of said judgment, &c.

E. A. Armstrong,
Attorney for and of Counsel with
Isaac W. Coles, Plaintiff in Error.

Service of a copy of the within assignments of error hereby acknowledged this sixth day of May, A. D. 1902.

D. J. Pancoast,
Atty. Deft. in Error.