

SENATE....No. 34.

Commonwealth of Massachusetts.

IN SENATE, February 16, 1849.

The Joint Standing Committee, to which was committed the petition of Nathan Pratt, and others, asking an inquiry into the proceedings of the Fitchburg Railroad Company, in relation to the location of the Lancaster and Sterling Branch Railroad, and the petition of William A. Howe, and others, asking that the charter of the Lancaster and Sterling Branch Railroad may be revived, and that the Fitchburg Railroad Company may be required to apply to the purposes of said charter the capital they have created by its charter, &c.,

R E P O R T :

That said Lancaster and Sterling Branch Railroad Company was incorporated in 1846, and empowered, by its charter, to locate, construct, and maintain, with one or more tracks, a branch railroad, "commencing at some convenient point in the Fitchburg Railroad, in the town of Acton; thence running to the village of Stow; thence, through Bolton and Lancaster, to a point in Sterling, convenient to intersect the contemplated railroad from Fitchburg towards Worcester; or, at the option of said company, commencing at some convenient point in the Fitchburg Railroad, in the westerly part of the town of Concord; thence, running through Acton, Sudbury, Stow, Marl-

boro', Bolton, Berlin, and Lancaster, to the terminus aforesaid, in Sterling."

That the capital of said company was six hundred thousand dollars, and the company was empowered, by its charter, "by a vote of its stockholders, at a meeting called for the purpose, to unite with the Fitchburg Railroad Company: *provided*, the stockholders of said Fitchburg Railroad Company should, at a meeting called for the purpose, agree to the same." This union was subsequently effected; and, agreeably to the provisions of the charter, the Lancaster and Sterling Branch Railroad Company became merged in, and took the name of, the Fitchburg Railroad Company, which company has created stock under the authority of the Lancaster and Sterling Branch Railroad charter, having, in the year 1847, obtained from the Legislature authority to locate and construct said branch in sections.

Acting under the Lancaster and Sterling charter, and in accordance with the advice of counsel, the Fitchburg Company, adopting the southerly route of the Lancaster and Sterling Branch, have located the same to the terminus of the section at Feltonville, in the town of Marlborough, by taking a course, beginning at the westerly part of Concord; thence running parallel with the Fitchburg Railroad to Acton; thence diverging southerly to Knight's Mills; and thence, by the admitted southerly route, to Feltonville. The written location shows, that the land, taken for this branch, beginning at the westerly part of Concord, near Loring's switch, and ending at Feltonville, varies from fourteen feet to five rods in width. The track of the branch is laid to Acton, upon the road-bed of the Fitchburg Railroad, and so placed as to answer as a second track for that road, and is used as such.

The location of the road from Knight's Mills to Feltonville is not complained of by the petitioners, and is admitted to be upon the south route as contemplated by the applicants for the charter. The maps used before the Legislature, when the charter of the Lancaster and Sterling Road was granted, are said to be lost, and the petitioners proved that the south route, as delineated upon those maps, was traced along the valley of

the Assabet River, from Knight's Mills to Concord, and they contend that a true construction of the charter will not allow a deviation from the river, of one mile and a fourth, as contended for by the Fitchburg Railroad Company. They also contend, that, inasmuch as the line of the south route was described as running through Acton, Sudbury, Stow, Marlborough, &c., those towns must be run through by the road in the same order in which they stood in the charter. The respondents deny this to be the true construction, because the word "thence" does not succeed the name of any town other than that at the eastern terminus, while, in describing the northerly route in the same charter, the word "thence" indicates the order in which the road shall pass to Bolton and Lancaster, and shows that, whilst the order was, to a certain extent, prescribed upon one route, it was, upon the other and southerly route, left to the discretion of the corporation under the existing laws. The profile, used by the applicants for the Lancaster and Sterling charter, traces the southerly route, as prayed for, through Acton, Sudbury, Stow, then again into Sudbury, and through a portion of Stow to Marlborough; and the respondents contend, that, upon this mode of construction, the route, as located, is in compliance with the charter.

The respondents contend, that it is within the discretion of the corporation to vary the road from the line of the Assabet River, keeping within the towns named, if a more feasible route can be found falling within the limits of the charter; and they contend that the route adopted by them will prove a cheaper, safer, and better route, than the one by the Assabet River. The petitioners deny this last position. The evidence upon this point is not reported, because it becomes immaterial to the disposition, which the committee recommend, of the subject.

Taking the route adopted by the respondents, the distance from Feltonville to Concord is increased one and fifty-eight hundredths miles. The travel will, however, intersect the Fitchburg Road at a point where all the trains, passing thereon, now stop, and will have a double track two miles.

By recurring to the charter of the Lancaster and Sterling

Branch Railroad Company, it will be seen that the time limited for its construction will expire on the sixteenth of April next, and, although the construction of the road, to be completed on that day, has been contracted for, but a small sum has as yet been expended upon that portion south of the point of divergence at Acton. By the law authorizing the construction of this road in sections, it seems, in some degree, limited to the accommodation of the district of country through which it was designed to run, and the grantees live near the routes specified in the charter. Two of the grantees named in the act of incorporation are satisfied with the location of the road as made; the other is a subscriber to the petition of Nathan Pratt and others.

The prayer of the two petitions was somewhat different, but, at the hearing, the counsel for the petitioners modified the respective prayers, and asked—

“That an act be passed, amending the charter of the Fitchburg Railroad Company, so as to require said company to locate and construct the Lancaster and Sterling Branch thereof, in conformity to one or the other of the routes authorized by the act creating said branch; and, if said Fitchburg Railroad Company elects the one of said routes that is described as commencing in Concord, then that it be required to construct the same, within a specified period, along the valley of the Assabet River, as intended by said Lancaster and Sterling Branch Charter.”

Or, that an act be passed requiring the Fitchburg Railroad Company to construct said branch, in the manner aforesaid, as far as Feltonville, in Marlborough, following the valley of said Assabet River as far as Knight's Mills.

And, further, that, if the said Fitchburg Railroad Company shall not comply with such of these requirements as the Legislature shall see fit to enact, then that said company be required to reduce its capital stock to such an amount as it would be legally entitled to create, had the act, incorporating said Lancaster and Sterling Branch, never been passed.

The first section of the modified prayer is intended, as the committee infer, to embrace the requisitions of the petition of Wm.

A. Howe and others. The second section is not repugnant to the prayer of the petition of Nathan Pratt and others, which, it will be seen, is very general, and mainly demands, in reference to the location and construction of the branch road, that it be done in "substantial conformity with the restrictions in the charter." In substance, it asks (what it will be readily seen is the only question referred by the parties to the Legislature) for a construction of the charter of the Lancaster and Sterling Branch Road. The committee are not aware that the question, which has arisen between these parties, has ever been settled in this Commonwealth, either by the supreme court, or the Legislature, or that there has been any such action, by either branch of the government, as would afford a safe guide in the settlement of this question by legislative enactment. No authority supposed to bear upon the issue, excepting the Revised Statutes, and the case of Crease and Babcock, in the 23d of Pick., 334, which were referred to by the counsel for the petitioners, was shown to the committee. It will be seen, by an examination of the above cited case, that, so far as it bears upon the question between these parties, it only decides the constitutionality of the twenty-third section of the forty-fourth chapter of the Revised Statutes.

It being apparent that the question at issue, between the petitioners and the respondents, is one which can only be rightfully settled by a legal construction of the charter under which the respondents are acting, and that its importance demands a careful consideration of legal principles, for the investigation of which the judicial courts are best adapted, the committee have unanimously determined, that it was expedient for the aggrieved parties to settle the question at issue, if its settlement be desirable, by an application to the legal tribunals; and if, after a decision of the question, there should remain any reason for legislative interference, the subject will be free of the difficulty which this question occasions. It is, therefore, recommended that the petitioners have leave to withdraw.

TAPPAN WENTWORTH, *Chairman.*

