

to be done, can affect the question of right between these parties. Unless, indeed, the damage should be shewn to be so small, as, that the law would take no notice of it; as in actions of waste, where the waste is unimportant in its nature and trivial in amount. (d) But these buildings, it must be recollected, have been put up, as is alleged and admitted, for the manufacture of gunpowder; and are more properly suited for that purpose than if they had been constructed of brick, stone, or hard materials strongly bound together; in which kind of edifices an explosion would be attended with much more certain and wide-spreading destruction than in lightly framed houses or sheds, such as these are described to be; and therefore they could not be complained of as nuisances by those residing in their vicinity; because of their being too dangerously or improperly constructed for the uses to which they are applied. (e) It is then manifest, that the plaintiffs' cause of complaint cannot, in any sense, be deemed frivolous because of the frail nature of their buildings.

As to the mere facts of this case there is then no substantial difference between the parties. The plaintiffs assert and the defendants admit, that the proposed rail road has been located, and is intended to be constructed over a part of the land of the plaintiffs; and that one of their edifices, erected for the manufactory of gunpowder, is intended to be removed. The distance which the road is to pass over the land of the plaintiffs, and the amount of the increased hazard, although alleged and denied, and not particularly described, are unimportant as regards the questions of right between these litigants.

By the act of 1827, ch. 72, s. 15, the plaintiffs are authorized, for the purpose of making their rail road, to agree with the owner of any land for the purchase, or use and occupation of the same, 'and if they cannot agree, and if the owner or owners, or any of them, be a *feme covert*, under age, *non compos mentis*, or out of the county in which the property wanted may lie,' application may be made to a justice of the peace, and proceedings had to have it condemned to their use. Upon which it was urged, that although the defendants may have an unlimited power to contract or agree, in any manner, with the owner for any land they may want for their road; yet the power to take the lands of others from them, against

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(d) *The Governors of Harrow School v. Alderton*, 2 Bos. & Pul. 86; *The Universities of Oxford v. Richardson*, 6 Ves. 706.—(e) *Crowder v. Tinkler*, 19 Ves. 626.