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Railroads -- Misuse of Right of Way

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Railroads—Misuse of Right of Way

Land acquired for a railroad right of way, whether by condemnation, prescription, statutory presumption,[1] or by grant for railroad purposes from the owner of the fee,[2] gives to the railroad only an easement in such land.[3] Unless there is an express grant of a fee title,[4] the right of way can be used for railroad purposes and no others. The same principle is applicable to all public or quasi-public corporations which have the power of eminent domain, i.e., the land can be used only for the purposes for which it was taken.[5] The reasons for such a limitation are twofold: (1) The right to acquire land by condemnation is based on the presumption that the property so acquired will be used for the benefit of the public. (2) A use for other purposes imposes an additional burden upon the land for which the owner has not been compensated. A railroad is not entitled to the exclusive use of the entire right of way, and the owner of the fee is permitted to use so much of it as is not actually required for railroad purposes.[6] But the railroad may later secure an injunction to have any obstruction removed when it is shown that the use interferes with the operation of the railroad.[7]

[1] Several states have statutes which provide that if an action to recover compensation for land taken for a railroad right of way is not brought within a fixed period, the railroad is presumed to have acquired the land for railroad purposes. N. C. GEN. STAT. §1-51 (1943) provides that no action for compensation for land taken for a right of way by a railroad shall be brought unless commenced within five years after the land has been entered, or within two years after the railroad has started operations.

[2] For aid in distinguishing whether a deed to the railroad conveys a fee or an easement, see Note, 132 A. L. R. 142 (1941).

[3] Grand Trunk R.R. v. Richardson, 91 U. S. 454 (1875); Norfolk So. R.R. v. Strickland, 264 Fed. 546 (E. D. N. C. 1920); Hodges v. A. C. L. R.R., 196 N. C. 66, 144 S. E. 528 (1928); McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Seaboard A. L. Ry. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Raleigh and Augusta R.R. v. Sturgeon, 120 N. C. 225, 26 S. E. 797 (1896). TIFFANY, REAL PROPERTY §1253 (3d ed. 1939). See Notes, 94 A. L. R. 525 (1935); 149 A. L. R. 380 (1944).

[4] Both the statutes of the state and the charter of the railroad company must be examined to ascertain if the company has power to acquire a fee title to land. N. C. GEN. STAT. §60-37(3) (1943) provides that railroads may acquire land by voluntary grant, but land so acquired may be used only for railroad purposes. N. C. GEN. STAT. §60-37(4) (1943) allows railroads to acquire necessary land by purchase with no qualifications as to use.

[5] This is the general rule unless there is a statute explicitly authorizing the taking of the fee by condemnation. Hudson & M. R.R. v. Wendel, 193 N. Y. 166, 85 N. E. 1023 (1908); Neitzel v. Spokane International R.R., 65 Wash. 100, 117 Pac. 864 (1911). 4 TIFFANY, REAL PROPERTY §1253 (3d ed. 1939); 2 LEWIS, EMINENT DOMAIN §§449-451 (1900).

[6] Carolina & N. W. R.R. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); A. C. L. R.R. v. Bunting, 168 N. C. 579, 84 S. E. 1009 (1915); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Shields v. Norfolk and Carolina R.R., 129 N. C. 1, 39 S. E. 582 (1901).

[7] Norfolk So. R.R. v. Strickland, 264 Fed. 546 (E. D. N. C. 1920); Carolina & N. W. R.R. v. Piedmont Wagon and Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941);

Several cases in which the use has been held proper have indicated that the manner in which the right of way may be used is within the sole discretion of the railroad,[8] but a later decision makes it clear that the use must be for railroad purposes only.[9] It is generally recognized that the railroad may license third persons to use the right of way in any manner in which the railroad itself might use it.[10] If the easement is used primarily for railroad purposes, the fact that incidental benefits flow to private parties does not constitute a misuse of the easement.

It is difficult to define a "railroad purpose" with any degree of certainty, but in practically all instances a proper use will be for one or several of the following purposes: (1) The operation and maintenance of the railroad. This includes passenger and freight depots,[11] shanties for the railroad employees,[12] telegraph lines,[13] and warning signals.[14] (2) Promotion of the enjoyment and convenience of the passengers and employees. The maintenance of hotels,[15] restaurants,[16] and parks[17] are proper if used primarily by passengers and employees. (3) The erection of facilities for receiving, storing, and shipping freight. This includes use for a lumber yard,[18] grain elevator,[19] or warehouse[20] where shipment of material is directly from these points rather than from the regular freight depots. The impracticality of re-

McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906). N. C. GEN. STAT §1-44 (1943) provides that a railroad cannot be barred from its right of way by the adverse possession of another.

[8] Carolina & N. W. Ry. v. Piedmont Wagon & Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949); Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941); Hodges v. A. C. L. R.R., 196 N. C. 66, 144 S. E. 528 (1928); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914); Raleigh and Augusta R.R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906).

[9] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[10] Grand Trunk R.R. v. Richardson, 91 U. S. 454 (1875); Mitchell v. Illinois C. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Weir v. Standard Oil Co., 136 Miss. 205, 101 So. 290 (1924); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

[11] Elyton Land Co. v. South & North Ala. R.R., 95 Ala. 631, 10 So. 270 (1891).

[12] Hodges v. A. C. L. Ry., 196 N. C. 66, 144 S. E. 528 (1928).

[13] Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 (1903). The telegraph line was held to be a misuse of the easement because it was primarily for commercial purposes, but the court stated that had the line been erected primarily for use in operation of the railroad it would have been proper.

[14] Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941).

[15] Abraham v. Oregon & C. R.R., 370 Ore. 495, 60 Pac. 899 (1900) (But not proper if used primarily by the general public.).

[16] Grudger v. Richmond and Danville R.R., 106 N. C. 481, 11 S. E. 515 (1889). N. C. GEN. STAT. §60-37(12) (1943) provides that a railroad may operate hotels and restaurants along its right of way for the convenience of the traveling public.

[17] Louisville Property Co. v. Commonwealth, 146 Ky. 827, 143 S. W. 412 (1912).

[18] Grand Truck R.R. v. Richardson, 91 U. S. 454 (1875).

[19] Illinois Central R.R. v. Wathen, 17 Ill. App. 582 (1857).

[20] Anderson v. Interstate Mfg. Co., 152 Iowa 455, 132 N. W. 812 (1911); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

quiring railroads to receive and ship all freight from its regular terminals is apparent, and such a use seems justified. The use of these facilities, however, should be of a substantial nature. A use of the easement where gasoline was received for sales by a filling station was a misuse,[21] whereas a use for bulk oil storage for distribution to retail dealers was help proper.[22] (4) Lease of the right of way to private parties to secure their freight business. Several courts have stated that such a use is for a railroad purpose, particularly where the lease provides that the lessee give preference in shipment of freight to the railroads.[23] It should be noted, however, that in practically all cases where a lease of the right of way to procure business has been held proper, facilities for receiving and shipping freight have existed upon the leased property and have been a prime factor in determining the propriety of the use.

In a recent case, the defendant tobacco company leased from a railroad for a nominal rent a portion of its right of way upon which the tobacco company erected two warehouses. The lease contained no provision compelling the tobacco company to ship over the railroad, but the company did so in all but a few instances. A spur track had originally been extended to the warehouses to facilitate shipment, but it was removed prior to this action. The tobacco company thereafter shipped all its freight from the regular freight depot. The owner of the fee, subject to the railroad right of way, was allowed to recover the land upon which the warehouses were located in an action of ejectment on the ground that the leased property was not being used for railroad purposes.[24]

Due to the absence of any shipping facilities on the right of way, the decision appears to be in accordance with authority. The court emphasized the lack of an express provision to ship over the railroad, but under the circumstances, such a provision appears unnecessary.[25] That the rent was nominal and that the tobacco company shipped almost

[21] *In re* Chicago & N. W. R.R., 127 F. 2d 1001 (7th Cir. 1942).

[22] Mitchell v. Illinois C. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Weir v. Standard Oil Co., 136 Miss. 205, 101 So. 290 (1924).

[23] Anderson v. Interstate Mfg. Co., 152 Iowa 455, 132 N. W. 812 (1911) (shipping a part of its goods over a competitor railroad not sufficient to work a forfetiture); Griswold v. Ill. C. R.R., 90 Iowa 265, 57 N. W. 843 (1894); City of Detroit v. C. H. Little Co., 146 Mich. 384, 109 N. W. 671 (1906); Hall v. Bowers, 117 Neb. 619, 222 N. W. 40 (1928) (use of right of way to drive cattle to shipping terminal); Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914).

[24] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[25] The lack of a provision to give the railroad preference in shipment was the principal distinction made between the present case and a previous case in which the use of a right of way for a wholesale grocery warehouse was held proper. However, the decision there rested primarily on the fact that the use of the land was to facilitate shipment over the railroad. Coit v. Owenby-Wofford Co., 166 N. C. 136, 81 S. E. 1067 (1914), 28 HARV. L. REV. 208 (1914).

exclusively over the lessor railroad clearly indicate that the procurement of business was the real consideration for the execution of the lease. In the absence of shipping facilities, it is questionable if a lease of a portion of the right of way solely to promote business would be held proper, even where there is a provision to give the railroad preference in shipping.[26]

Where there is a misuse of the easement, several remedies are available to the owner of the fee. If the railroad abandons operation of the road altogether, it has forfeited all rights to the easement, and the owner may reenter the land.[27] But when the railroad continues in operation, and only a portion of the right of way has been subjected to a misuse, the owner of the fee may obtain an injunction to prevent further misuse,[28] or bring an action for damages against the party so misusing the land,[29] or, as in the principal case, bring ejectment for recovery of that portion of the easement so misused.[30] Where the additional burden placed upon the land is itself for a public purpose, damages are as a general rule the only remedy available.[31] If permanent damages are recovered, the effect is to give an easement to the party paying the damages.[32] It should be noted that an action for damages in such cases

[26] "The fact that a business receives its goods by rail is not a conclusive determination that the use of easement land by the business is a proper one and not a burden." *In re* Chicago & N. W. R.R., 127 F. 2d 1001 (7th Cir. 1942); Bond v. Tex. & P. R.R., 181 La. 763, 160 So. 406 (1935); Proprietors of the Locks and Canals v. Nashua & L. R.R., 104 Mass. 1 (1870).

[27] Norton v. Duluth Transfer R.R., 129 Minn. 126, 151 N. W. 907 (1915). 4 TIFFANY, REAL PROPERTY §1256 (3d ed. 1939). But where buildings and other improvements are placed upon the right of way for the operation of the railroad, they may be removed in the same manner as personal property. Western N. C. R.R. v. Deal, 90 N. C. 110 (1884).

[28] Hodges v. A. C. L. Ry., 196 N. C. 66, 144 S. S. 528 (1928). Note, 7 N. C. L. REV. 197 (1929) (Injunction was refused, but the court states that injunction was the proper remedy had there been a misuse of the right of way.); Hales v. A. C. L. Ry., 172 N. C. 104, 90 S. E. 11 (1916); Ragsdale v. Southern Ry. Co., 60 S. C. 381, 38 S. E. 609 (1901).

[29] McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Beasley v. Aberdeen & Rockfish R.R., 145 N. C. 272, 59 S. E. 60 (1907); Hodges v. Western Union Telegraph Co., 133 N. C. 225, 45 S. E. 572 (1903).

[30] Mitchell v. Illinois Cent. R.R., 384 Ill. 258, 51 N. E. 2d 271 (1943); Neitzel v. Spokane International R.R., 65 Wash. 100, 117 Pac. 864 (1911).

[31] In McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907) the railroad leased its right of way to a larger line, which used it to a much greater extent. The holder of the fee sought ejectment because of the additional burden, but was awarded damages, the measure being the difference in the extent which the lessor road would have used the land and the extent which the larger railroad did use the land. Hodges v. Western Union Tel. Co., 133 N. C. 225, 45 S. E. 572 (1903). But several cases have held that even where the misuse was not for other public purposes, there could be no ejectment. Proprietors of the Locks and Canals v. Nashua & L. R.R., 104 Mass. 1 (1870) (mesne profits recovered); Lyon v. McDonald, 78 Tex. 71, 14 S. W. 261 (1890) (reasonable rental value recovered).

[32] McCullock v. N. C. R.R., 146 N. C. 316, 59 S. E. 882 (1907); Phillips v. Postal Telegraph Cable Co., 130 N. C. 513, 41 S. E. 1022 (1902).

is subject to the three-year statute of limitations,[33] whereas ejectment is apparently available for at least twenty years from the date of entry.[34] Although the remedies available to the owner of the fee in case of a misuse of a right of way may appear to be in the nature of a windfall, the inherent right of a landowner to have land which is taken for the public use restricted to that use seems to justify his right to relief.

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Restraint of Trade—Requirements Contracts—Violation of North Carolina Anti-Trust Statute

A North Carolina anti-trust statute[1] makes it unlawful for any person to make a sale, or to contract to make a sale "of any goods . . . in North Carolina, whether directly or indirectly . . . upon the condition that the purchaser thereof shall not deal in the goods . . . of a competitor or rival in the business of the person . . . making such sales."

In *Grubb Oil Co. v. Garner*,[2] the court held that a filling station lessor's covenant not to sell any petroleum products other than those of the lessee from the demised premises or from any other premises within a radius of two thousand feet constituted a "permissible restriction in a lease rather than a forbidden condition in a sales contract."[3] The court said the lessor apparently had no right to sell or deal with anything on the premises while under demise but, however this might be,[4] there was no allegation that the lessor agreed to purchase petroleum products from anyone—"a necessary averment to attract the provisions

[33] N. C. GEN. STAT. §1-52(3) (1943) provides that when there is a continuing trespass upon real property, the action shall be commenced within three years from the original trespass, and not thereafter. Teeter v. Postal Telegraph Cable Co., 172 N. C. 783, 90 S. E. 941 (1916).

[34] Sparrow v. Dixie Leaf Tobacco Co., 232 N. C. 589, 61 S. E. 2d 700 (1950).

[1] N. C. GEN. STAT. §75-5 (1943): "In addition to the matters and things hereinbefore declared to be illegal, the following acts are declared to be unlawful, that is, for any person, firm, corporation, or association directly or indirectly to do or to have any contract, express or knowingly implied, to do any of the acts or things specified in any of the subsections of this section. (2) To make a sale of any goods, wares, merchandise, articles or things of value whatsoever in North Carolina, whether directly or indirectly, or through any agent or employee, upon the condition that the purchaser thereof shall not deal in the goods, wares, merchandise, articles or things of value of a competitor or rival in the business of the person, firm, corporation or association making such sales." For the original enactment of the North Carolina statute to this effect see N. C. Pub. Laws 1907, c. 218, §1(a).

[2] 230 N. C. 499, 53 S. E. 2d 441 (1949).

[3] *Id.* at 501, 53 S. E. 2d at 443.

[4] Because of confusion in pleading it did not clearly appear by what arrangement the lessor was in possession of the premises. Although a lease-sublease arrangement was referred to, it was not properly alleged and therefore not considered by the court. *Id.* at 501, 53 S. E. 2d at 442.