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Railroads -- Right-of-Way -- Statutory Limitation Barring Recovery Therefor

William T. Joyner Jr.

North Carolina's strict attitude toward municipal regulation of automobiles has been embodied in the Motor Vehicle Act as N. C. GEN. STAT. §20-19 (1943): "Local authorities, except as expressly authorized . . . shall have no power or authority to alter any speed limitations declared in this article or to enact or enforce any rule or regulations contrary to the provisions of this article."[84] This statute and its predecessors in content may, indeed, account for the position taken by the Supreme Court. However, the court in the *Freshwater* case construed a former statute (N. C. C. S. §2601 (1922)) prohibiting ordinances contrary to the provisions of the chapter on motor vehicles, and said that the same result would follow without regard to the statutory inhibition.

Summary and conclusion. Ordinances are not permitted either to contradict or duplicate a state law in express terms. Where there is room for the court to go either way on the question of inconsistency the test should be the purpose behind the general law and how best to achieve the most effective regulation. The North Carolina decisions for the most part seem to give effect to this practical side of the problem. In the written opinions, however, the main issue is too often obscured by talk about "preempting the field," "lack of authority," and "conflict."

JAMES T. PRITCHETT, JR.

Railroads—Right-of-Way—Statutory Limitation Barring Recovery Therefor

In a recent North Carolina case,[1] the plaintiff railroad sought an injunction to require defendant to allow additional tracks to be built parallel to and within fifty feet of the original track. The charter of the railroad gave it the right to take land of "not more than one hundred feet from the center of the road"[2] by condemnation proceedings, and in 1884 the railroad had entered and laid its track on the original roadbed without bringing condemnation proceedings and without any conveyance from the owner. The defendant, or his predecessors in title, has been in possession of the land adjoining the roadbed ever since it was built and is the owner of the fee. In this case no action for compensation has ever been brought against the railroad. N. C. GEN. STAT. §1-51(1) bars any suit against a railroad for compensation for land taken unless brought within five years after the land has been

[84] *See* City of Fremont v. Keating, 96 Ohio St. 468, 118 N. E. 114 (1917) holding a similar statute unconstitutional as violating OHIO CONST. Art. XVIII §3 giving municipalities authority to adopt police regulations not in conflict with the general laws.

[1] Carolina & N. W. Ry. v. Piedmont Wagon & Mfg. Co., 229 N. C. 695, 51 S. E. 2d 301 (1949).

[2] N. C. Pub. Laws 1871-2, c. 130, §7.

entered or within two years after the road is in operation. The court *held* that this statute entitled the plaintiff, upon passage of the statutory time without action by the owner, to a right-of-way of the maximum width which its charter allowed it to condemn.[3]

It was early decided in North Carolina that a railroad could enter upon land and build its road without bringing condemnation proceedings.[4] When a railroad does thus enter and build its road, the owner cannot bring an action of ejectment or trespass, but can only bring the statutory action for compensation for the land taken.[5] In this proceeding either party may request that the width of the right-of-way to be acquired and paid for by the railroad be limited,[6] but unless this is done the railroad acquires a right-of-way of the maximum width allowed to be condemned by its charter[7] or by the general law if the charter is silent as to width.[8]

Many charters[9] after giving the railroad the right to condemn land for railroad purposes, provide that in the absence of a contract with the owner it shall be presumed that the land on which the road is constructed and 100 feet on either side has been granted to the railroad by the owner. The owner is given two years to bring an action to have his damages assessed and if not brought within that time his action is

[3] Under the wording of the statute it is possible that a right-of-way of 100 feet on either side of the road was acquired, but, for the purposes of this suit, the plaintiff only contended for a right-of-way of 50 feet on either side.

[4] Raleigh & Gaston R. R. v. Davis, 19 N. C. 451 (1837); McIntire v. Western N. C. R. R., 67 N. C. 278 (1872) (at page 280 the court says that the railroad "is not obliged to know that the owner claims damages, until he claims them in the mode provided.")

[5] Dargan v. Carolina Central R. R., 131 N. C. 623, 42 S. E. 979 (1902); Holloway v. University R. R., 85 N. C. 452 (1881); McIntire v. Western N. C. R. R., 67 N. C. 278 (1872); *see* Carolina Central R. R. v. McCaskill, 94 N. C. 746, 751 (1886).

[6] *See* Beal v. Durham & Charlotte R. R., 136 N. C. 298, 300, 48 S. E. 674 (1904); Hickory v. Southern Ry., 137 N. C. 189, 199, 49 S. E. 202, 204 (1904).

[7] Beal v. Durham & Charlotte R. R., 136 N. C. 298, 48 S. E. 674 (1904); *cf.* Liverman v. Roanoke & T. R. R. R., 114 N. C. 692, 19 S. E. 64 (1894) (here the charter was similar to that of the instant case and the plaintiff landowner was allowed to recover only for the value of the land "taken and occupied" plus the damage to the other land. However, the judgment of the trial court gave the railroad a right-of-way "as allowed by its charter"); Hanes v. North Carolina R. R., 109 N. C. 490, 13 S. E. 896 (1891); *see* Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 244, 97 S. E. 164, 166 (1918).

[8] N. C. GEN. STAT. §40-29(1) (1943) ("The width of the land condemned for any railroad shall not be less than eighty feet nor more than one hundred feet. . . ."). If the charter prescribes no maximum or minimum width then this section applies; *see* Griffith v. Southern Ry., 191 N. C. 84, 88, 131 S. E. 413, 415 (1926); Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 244, 97 S. E. 164, 166 (1918). *But cf.* Dowling v. Southern Ry., 194 N. C. 488, 140 S. E. 213 (1927) (statute not applicable because charter of railroad restricted right of way to only so much as was "wanted or necessary").

[9] *E.g.*, N. C. Pub. Laws 1848-9, c. 82 (North Carolina R. R.); N. C. Pub. Laws 1872-3, c. 75 (Carolina Central R. R.); N. C. Priv. Laws 1862-3, c. 26 (Chatham R. R.); N. C. Priv. Laws 1854-5, c. 225 (Wilmington, Charlotte & Rutherford R. R.); N. C. Priv. Laws 1854-5, c. 228 (Western N. C. R. R.).

barred. It has long been settled that the railroads with this type of charter acquire a right-of-way of 200 feet by statutory presumption merely by entering and building its road plus two years lapse of time without action by the owner.[10]

However, many railroad charters contain no such two-year bar.[11] These charters contain a specified maximum width which it may condemn or, if silent, are governed by N. C. GEN. STAT. §40-29 allowing the railroad to condemn a maximum of 100 feet. In 1890 it was held that if a railroad with this type of charter entered upon land and built its road the owner was not barred by the three-year statute of limitations on actions created by statute.[12] N. C. GEN. STAT. §1-51 was passed in 1893 placing a limitation on the owner's action; and the instant case is the first to hold that a railroad with this type of charter, by virtue of this statute, acquires a right-of-way of the maximum width which it *could* condemn rather than merely a right-of-way over the land actually *occupied*,[13] though previous decisions had indicated this result.[14]

[10] Southern Ry. v. Lissenbee, 219 N. C. 318, 13 S. E. 2d 561 (1941); Earnhardt v. Southern Ry., 157 N. C. 385, 72 S. E. 1056 (1911); Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Dargan v. Carolina Central R. R., 131 N. C. 623, 42 S. E. 979 (1902); Carolina Central R. R. v. McCaskill, 94 N. C. 746 (1886); Vinson v. North Carolina R. R., 74 N. C. 510 (1876); Norfolk Southern R. R. v. Stricklin, 264 F. 546 (E. D. N. C. 1920); *cf.* Atlantic & N. C. R. R. v. New Bern, 147 N. C. 176, 50 S. E. 925 (1908).

The statutory presumption applies only to the owner across whose land the road was built and not to an owner of adjoining land within the 100 foot limit. Wearn v. North Carolina R. R., 191 N. C. 575, 132 S. E. 576 (1926).

[11] *E.g.*, N. C. Priv. Laws 1893, c. 185 (Durham & Charlotte R. R.); N. C. Pub. Laws 1870-1, c. 172 (Kinston & Kenansville R. R.); N. C. Pub. Laws 1868-9, c. 226 (Scotland Neck & Weldon R. R.); N. C. Priv. Laws 1858-9, c. 163 (Washington & Leaksville R. R.); N. C. Pub. Laws 1835, c. 25 (Raleigh & Gaston R. R.).

[12] Land v. Wilmington & Weldon R. R., 107 N. C. 72, 12 S. E. 125 (1890) (the court held that CODE §155(2) (1883), now N. C. GEN. STAT. §1-52(2) (1943), was not applicable because the action was *created* by the Constitution and only *regulated* by statute).

[13] Though the railroad has a wider right-of-way, it is entitled to use only so much as is needed for railroad purposes. The rest may be used by the owner in any manner which does not interfere with the railroad's use. Hodges v. Atlantic C. L. R. R., 196 N. C. 66, 144 S. E. 528 (1928); Atlantic C. L. R. R. v. Bunting, 168 N. C. 579, 84 S. E. 1009 (1915); Coit v. Owenby-Wefford Co., 166 N. C. 136, 81 S. E. 1067 (1914); Raleigh & A. A. L. R. R. v. Sturgeon, 120 N. C. 225, 26 S. E. 779 (1897); Ward v. Wilmington & Weldon R. R., 109 N. C. 358, 13 S. E. 926 (1891).

[14] Griffith v. Southern Ry., 191 N. C. 84, 131 S. E. 413 (1926) (The railroad entered and built more than 5 years before this action without bringing condemnation proceedings. Its charter gave it only such rights as it had in Tennessee and there its charter gave it the right to condemn so much as "may be necessary for the said road." The court said that N. C. GEN. STAT. §40-29(1) 1943 (see note 8 *supra*) would apply giving the railroad 100 feet except that it would not apply in Tennessee.); Narron v. Wilmington & Weldon R. R., 122 N. C. 856, 29 S. E. 256 (1897) (The railroad entered and built more than 5 years before this action. Its charter gave it the right to condemn 130 feet. The lower court held that it had a right-of-way of 130 feet. The Supreme Court reversed, saying that N. C. GEN. STAT. §1-51(1) would bar the owner's action for damages, except that, at that time, the statute exempted railroads chartered before 1868 and this

The result of the instant case and the similar cases involving railroads with charters containing the two-year bar[15] seems unduly harsh on the landowner. For an understanding of why the legislature and the court have so favored the railroad in acquiring its right-of-way, it is necessary to look to the history and development of the railroad industry.[16] During the years 1830-1900 when most of the charters were granted and the roads built, the population was sparse, land cheap, and railroads greatly in demand. To induce investment of capital and construction of railroads the legislature granted the companies large privileges.[17] It was with this in mind that the legislature granted charters containing the two-year bar and passed N. C. GEN. STAT. §1-51. As stated by the North Carolina Supreme Court, "when the road has been constructed and the benefits enjoyed, although new and unexpected conditions have arisen, the rights granted may not be withdrawn, although the long-deferred assertion of their full extent may work hardships."[18]

WILLIAM T. JOYNER, JR.

Taxation—Duplication—North Carolina Policy Against

Double taxation, as that term is used by the courts, denotes two distinct concepts, and an understanding of the distinction between them is necessary to comprehend the nature of the problems arising on the subject. To constitute true double taxation two or more taxes must be imposed on the same property by the same governmental unit, during the same taxing period, and for the same purpose.[1] Taxation by two or more governmental units of the same income to the same person does

railroad was chartered before 1868.); *see* Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 244, 97 S. E. 164, 167 (1918).

Similar cases involving the width of a right-of-way have arisen where the owner has given the railroad a deed containing an indefinite description as to the width of the right-of-way. In these cases the rule is that the deed conveys the maximum width which the railroad would be allowed to condemn. Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 55 S. E. 263 (1906); Hendrix v. Southern Ry., 162 N. C. 9, 77 S. E. 1001 (1913); Heaton v. Kilpatrick, 195 N. C. 708, 143 S. E. 644 (1928). For cases recognizing the rule, but holding that the deed restricted the width *see,* Wearn v. North Carolina R. R., 191 N. C. 575, 132 S. E. 576 (1926); Tighe v. Seaboard A. L. R. R., 176 N. C. 239, 97 S. E. 164 (1918).

[15] See note 10 *supra.*

[16] See CONNOR'S HISTORY OF NORTH CAROLINA, Chap. 28, *The Railroad Era.*

[17] *See* Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 273, 55 S. E. 263, 269 (1906).

[18] Seaboard A. L. R. R. v. Olive, 142 N. C. 257, 274, 55 S. E. 263, 269 (1906). *See* Parks v. Southern Ry., 143 N. C. 289, 297, 55 S. E. 701, 704 (1906) where the court, after commenting on the policy of the state when the railroads were being built, said, "Conditions have changed, lands have increased in value and rights deemed of little value when the roads were built have become of importance. The courts, while endeavoring to have the law work out substantial justice, cannot change their decisions to meet these conditions."

[1] COOLEY, TAXATION §223 (4th ed. 1924); 61 C. J., Taxation §69.