Denver Law Review

Volume 20 | Issue 2 Article 2

July 2021

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This is the modern version of Jack and the Bean Stalk—only Jack is a farmer and the giant the high tension power line. You plant a bean and its grows—it's all as simple as that. But just how far the bean can grow, the courts have tried to determine for the past forty years. Generally speaking, it can grow into a lot of trouble.

The right of way man does his best to honestly explain the easement form he submits to the farmer, and his sincere, frank discussion at this point of negotiations can do much to avoid possible future misunderstandings. However, there are frequently complex legal and engineering questions involved.

For instance, the ordinary power line easement grants "the right to enter upon the right of way (ordinarily a given distance on each side of the center line) and to survey, construct, maintain, operate, control, and use said transmission line and to remove objects interfering therewith." The farmer reserves "the right to cultivate, use, and occupy said premises for any purpose consistent with the rights and privileges above granted," and "which will not interfere with or endanger any of the equipment of the grantee."

But what about that word "consistent," the word "interfere" or the word "endanger"? Certainly the farmer can raise row crops underneath the line, or grain, even corn. But how about fruit trees or shade trees? Sometimes a farmer wants to build a shed, granary or house on the right of way. On the other hand, the power line operators may want to fence it, to cut trees down, to modernize their lightning protectors.

These are every-day problems in the operation of an electrical transmission line and relatively little precedent exists to furnish a satisfactory guide.

The Alabama Power Company[1] used an easement containing the general provisions (slightly modified) above quoted and "all the rights

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[1]Collins v. Alabama Power Co., 214 Ala. 643, 108 So. 868, 46 A. L. R. 1459 (1926).

and privileges therein necessary or convenient for the full enjoyment of the use thereof for the purpose above described," also "the right to cut and keep clear all trees and undergrowth and other obstructions on said strip." Everyone was happy until farmer Collins (no relation to Tom) built himself a house 25 feet long, of which 15 feet was on the right of way. The wires cleared the top of the house by 25 feet. Farmer Collins didn't object to having the lines over his house and couldn't see why the company did. But it did. The court required the removal of the house, saying:

> "We think that there can be no doubt that the dwelling house resting in part upon complainant's right of way is an obstruction such as complainant sought to guard against when it took a grant of its right of way from Evans (landowner). It involves not only an obstruction to complainant's movements along its lines, but also is so located in its relation to its power lines as to constitute a hazard of no small concern to both the complainant and the occupants of the building. Moreover, the situation shown by the agreed statement of facts is one which if acquiesced in by complainant may be expected under the peculiar status of the law declared in *S. A. L. R. Company vs. Banks*, 92 So. 117, to invite controversy as to the right and title of difficult solution, such as any prudently managed business corporation would seek to avoid."

With reference to general farming purposes, the court said the owner "has the right to use such strip of land for any purpose which does not conflict with the paramount rights of complainant, and subject to such rights, may cultivate the same, pass along, and across it and generally use it in any way which does not affect the rights of the complainant herein."

Not all obstructions are houses. A farmer can certainly lay a loose wood plank on the right of way, or two or three, but when his pile of lumber gets to be 15 feet high, he has troubles. At least Kesterson did.[2] The wires broke, and a fire resulted, destroying Kesterson's lumber. He sued for damages. The power company secured an easement from the owner containing generally the provisions above noted and also "to maintain gates at all fences crossed by said lines and to keep private locks thereon." Owner reserved "right to cultivate said right of way and otherwise use and enjoy the same." The court, refusing damages, said:

> "We cannot conceive that any ordinary power line will stand perpetually without repair. This involves the necessity of hauling

[2]Kesterson v. California-Oregon Power Co., 228 Pac. 1092 (Ore. 1924), rev'd on other grounds in 114 Ore. 22, 228 Pac. 1092.

upon the right of way materials with which to maintain the line, such as poles, etc. How can this be accomplished if the right of way is obstructed by piles of lumber 15 feet high * * *? The phrase 'otherwise use and enjoy the same' should not be construed to let in every kind of occupancy 'otherwise' than cultivation for that would defeat the very deed. The 'otherwise' enjoyment clause cannot be construed to nullify or destroy the provisions of the deed itself."

Sometimes jurors ask embarrassing questions. In the trial of a condemnation suit in Kentucky,[3] where the power company sought a right of way, the jury asked the court if the land owner would have the right to bring coal and timber out over the strip of land condemned. The trial court answered the question, saying the company had "the exclusive right to said easement and privileges if it sees fit to exercise them." The appellate court reversed the case because of the answer to the jury and said:

"Use of an easement must be as reasonable and as little burdensome to the servient estate as the nature of the easement and object of it will permit * * *. The land owners had a perfect right to use the strips sought to be condemned * * * in any way they saw fit, * * * including the removal of coal and timber from the remaining lands."

In Alabama, the Keystone Lime Company[4] maintained it had a right to remove minerals from the right of way for the power line. This contention was sustained by the court, saying:

"The condemnation proceedings do not touch the land ownership of the minerals on the strip, if there are minerals there, nor do they preclude the land owner from taking minerals therefrom, provided this is done in such a way as not to obstruct the use by power company of so much of the surface as it may now need or need in the future for the proper maintenance of its appliances for conducting electricity."

So far as the farmer is concerned, it may be stated that he is entitled to use the right of way, provided such use does not impair, obstruct or endanger the power line. What constitutes impairment or obstruction is, however, a question largely of fact, dependent on the facts of each case. No general factual observation or rule can be laid down.

[3]Kentucky and West Virginia Power Co. v. Elkhorn City Land Co., 212 Ky. 624, 279 S. W. 1082 (1926).

[4]Alabama Power Co. v. Keystone Lime Co., 191 Ala. 58, 67 So. 833, Ann. Cas. 1917 C. 878 (1915).

On the other hand, the power company, too, is restricted in the exercise of its rights. The question sometimes arises whether the right of way for the line can be fenced where no specific provision for fencing has been sought or obtained. This point arose in *Alabama Power Company v. Keystone Lime Company*,[5] and the court said:

> "Land owners have the right to cultivate the land, to go across it and generally * * * to use it in any way which does not affect the paramount right of the power company. Power company has no right * * * and there is in the nature of things no reason for it * * * to fence either side of the right of way."

And in Alabama in another case,[6] the court left no doubt in the jurors' minds when it said, "I charge you, gentlemen of the jury, that the A. P. Company acquires no right to fence either side of the right of way involved in this case."

Fencing is a matter which may be governed by state statute, hence the statutes of each state must be consulted, regardless of decisions in another state. Generally speaking, unless the fee title to a definite strip of land is acquired, no right of fencing exists.

For crossing a lake, a lineman's dream is a bridge across the lake and immediately under the power line. For a while the dream came true, but the Public Service Gas and Electric Company's employees now have to row because a court required it[7] and the bridge was torn down. The power company used a general form of easement, and the lake owner reserved the "fee simple and full and complete enjoyment of and dominion over the granted premises for any use or purpose not inconsistent." In the middle of the lake was an island which the power company connected to the mainland by a board walk 5 feet wide and 2,600 feet long, 3 feet above the surface of the lake. The bridge interfered with boating. The lake was too shallow for the power company's crews to use a boat all the way. Result—the bridge was required to be dismantled and a channel under the line dredged for maintenance boats, and in return, the lake owner was required to keep the lake at a constant level. The moral to the story is that when a bridge is contemplated, specific permission for its construction and maintenance should be secured.

Trees cause trouble. Adam and Eve got in a jam because of a fruit tree, but the Wisconsin and Minnesota Light and Power Company had their day in court because of 108 shade trees.[8] Instead of the ordinary

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[5]Ibid.

[6]Alabama Power Co. v. Sides, 212 Ala. 687, 103 So. 859 (1925).

[7]Lidgerwood Estates, Inc. v. Public Service Gas & Electric Co., 113 N. J. Eq. 403, 167 Atl. 197 (1933).

[8]Brown v. Wisconsin-Minnesota Light & Power Co., 170 Wis. 288, 174 N. W. 903 (1919).

easement, the company took an option to buy a 50-foot strip of ground which contained the restriction, "trees to be so trimmed as not to interfere with the lines." The contract provided that the money paid by the power company "is in full payment for all damages caused by the cutting of timber on all lands owned by us (landowner) which may be found necessary in order to leave the lines safe from falling timber." The court in sustaining the right of the farmer to recover damages for cutting trees, said:

> "We think the provision with regard to the trimming of trees * * * is not unreasonable * * *. They unquestionably desired to retain the trees as far as was consistent with the operation of the electric transmission wires, and this desire was expressed in the words 'trees to be trimmed so as not to interfere with the lines'."

Where numerous trees are to be cut, it is advisable to specifically provide for the cutting, and omission of any reference to trimming is desirable. The case is of interest in another point in that the court indicated that a ten-foot clearance of trees by power line was a safe practice.

Apparently the court didn't have the same trouble in reading a contract in Texas.[9] The easement read, "to remove from said land all trees and parts thereof or other obstructions which endanger or may interfere with the safety or efficiency of said line or its appurtenances and the right to exercise all other rights hereby granted," and the court said, "Under that instrument, the company had the authority to remove trees or parts thereof that obstructed its right of way across said land and there would be no ground for recovery unless it was shown that company had unnecessarily destroyed the trees." Of interest also is the statement in the case that merely because the owner fears the wire might break and injure him does not entitle recovery of damages because of such fears.

Some states have specific statutes permitting the power company to remove all timber on the right of way and outside of the right of way such timber as may endanger the line by falling. This is the situation in Alabama. Few, if any, such statutes exist in other states.

The problems of a power company are not limited to trees and bridges. Frequently, it is necessary to modernize transmission lines by installing lightning protectors. This was the situation of the Pennsylvania Water and Power Company.[10] The company held an easement which did not describe the width of the right of way or the center line,

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[9]Central Power & Light Co. v. Johnston, 24 S. W. (2d) 762 (Tex. Civ. App. 1930).

[10]Pennsylvania Water & Power Co. v. Reigart, 127 Pa. Super. 600, 193 Atl. 311 (1937).

but included the right "of entry, construction, and operation, right to cut or trim trees, and the right to build from time to time on said right of way such additional lines as they (power company) wish." The number of structures was limited to one. To decrease lightning trouble, twelve years after the line was built, the company buried in the ground 20 inches deep two wires connecting towers and outside of the former right of way (in part) and also static wires on top of towers but inside the right of way. The company sought an injunction against interference by the farmer. The court said:

> "Where limits of right of way are not set by instrument, parties by acts can establish it to mutual consent, but once set, it cannot be changed at pleasure of grantee. It is clear that the placing of the counterpoise in the ground and beyond the limits of the right of way as established imposed an additional servitude on defendant's land."

As to overhead wires,

> "They do not interfere with the use of the surface and are located within the limits of the span of the power line. * * * These overhead lightning resistors are within such limits and add no real burden on the land."

Other companies have left the description of their right of way uncertain.[11] When the company tried to alter the location of the line after it was constructed, the court said, "An indefinite right of way description once made certain by reason of location and construction of a line cannot be thereafter altered at mere pleasure of grantee."

In conclusion, it is suggested that the right to fence, to cut or trim trees, to construct a bridge, or to exercise any unusual powers in connection with a power line should be specifically provided for. Caution should be exercised in using one standard form of easement for all tracts of land crossed. In case some unusual structure is contemplated or a variation from the general scheme, the attorney in charge of right of way should be first consulted before contacting the landowner.

The foregoing cases referred to constitute most of the decisions in the United States concerning power line easements. Generally speaking, such easements are subject to the same interpretation and subject to the same limitations as apply to easements of other types. Because of the relatively few years that power lines have been in use, little specific judicial precedent exists to guide the right-of-way engineer and attorney.

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[11]Tennessee Public Service Co. v. Price, 16 Tenn. App. 58, 65 S. W. (2d) 879 (1932).