November 1923

Eminent Domain–Electricity–Easements

H. C. H.

West Virginia University College of Law

Follow this and additional works at: https://researchrepository.wvu.edu/wvlr

Part of the Energy and Utilities Law Commons, and the Property Law and Real Estate Commons

Recommended Citation


Available at: https://researchrepository.wvu.edu/wvlr/vol30/iss1/9

This Student Notes and Recent Cases is brought to you for free and open access by the WVU College of Law at The Research Repository @ WVU. It has been accepted for inclusion in West Virginia Law Review by an authorized editor of The Research Repository @ WVU. For more information, please contact ian.harmon@mail.wvu.edu.
STUDENT NOTES AND RECENT CASES

EMINENT DOMAIN — ELECTRICITY — EASEMENTS — Whether the placing of poles and wires in city streets puts an additional burden upon the easement in the street is a question often arising before the courts. It has been so variously dealt with, that to the seeker for authority the question is not without likeness to the mythological hydra of many heads.1

The rule itself is universally regarded as settled law, namely, that where streets are put to uses inconsistent with the purposes to which they were dedicated, the abutting owner is entitled to compensation.2 The confusion has resulted entirely from the application of the rule to specific cases.

Confusion begins with a split of authority on the question whether poles and wires are additional burdens upon easements in streets for which the abutting owner can recover compensation. From this point confusion becomes chaos. It is generally held that although such a use of the street puts an additional burden on the easement, if the abutting owner does not own the fee of the street he can not recover compensation nor enjoin the use unless he suffers a special damage.3 Some courts hold that where the use is an added burden in a proper case, the title to the fee being in the municipality, the abutting owner may resort to injunction but not to an action for damages.4 Courts that regard poles and wires as additional burdens allow the abutting owner to recover compensation.5 Authority from the state or from the municipal corporation to maintain the line along the street can not injuriously affect the rights of abutting owners.6 Another distinction made in some jurisdictions is to the effect that highways may be subjected to new uses facilitating travel, improving or preserving the streets

4 Southwestern Telegraph & Telephone Co. v. Smithdeal, 104 Tex. 258, 133 S. W. 1949 (1911); Bronson v. Albion Telephone Co., 67 Neb. 111, 93 N. W. 201 (1903); Eells v. Am. Telegraph & Telephone Co., 143 N. Y. 133, 38 N. E. 202 (1894).
5 Osborn v. Auburn Telephone Co., 159 N. Y. 393, 22 N. E. 424 (1907); Burrall v. Am. Telephone & Telegraph Co., 224 Ill. 266, 79 N. E. 705 (1906); Callen v. Columbus Edison Electric Light Co., 66 Ohio St. 186, 64 N. E. 141 (1902).
STAIRWAY SHOWING BROOKE AND WILLEY PORTRAITS.
and where poles and wires are so used they do not add additional burdens upon the easement.\textsuperscript{7} But even in some of these jurisdictions telegraph and telephone poles and wires are considered as adding a burden to the easement for which compensation may be recovered.\textsuperscript{8} The mere fact that messages are transmitted over the lines does not make such a use of the street any the less a taking of property. Again it is said that lines and poles are not additional burdens in city streets while they would be considered burdens upon rural highways.\textsuperscript{9} In other states this distinction has been expressly disapproved.\textsuperscript{10} Another view is that where the poles and lines constitute an equipment for public lighting there is no added burden, but where such equipment is used for lighting private residences, or to supply factories, it is an added burden.\textsuperscript{11}

The West Virginia court has decided that telephone lines and poles did not constitute an additional burden upon the easement in a public street, the fee of the street being in the abutting owner.\textsuperscript{12} Later it was held that the owner of the fee in a rural highway had no remedy for the placing of telephone poles and lines along the edge of the highway, and expressly negativing the distinction between rural highways and city streets in regard to this subject.\textsuperscript{13} In relation to the use of poles and lines in a street, the fee of which was in the abutting owner, for the purpose of furnishing lights and power to residents, the court held there was no additional burden upon the easement, because it was a reasonable use of the street.\textsuperscript{14} The court ignores the distinction above pointed out between use for private and use for public purposes.\textsuperscript{15}

In a recent case the West Virginia court intimated that a high voltage electric line, one of the supports of which was a steel tower, three and one-half feet square, set in the street at a corner of a valuable city lot would not be an added burden on the easement to which an abutting owner not owning the fee of the street, could object. There was a large sign on the tower to warn all persons of danger. The plaintiff sued for damages. There being no damages alleged except the decrease in value of the

\textsuperscript{7} Palmer \textit{v.} Larchmont Electric Co., 158 N. Y. 231, 52 N. E. 1092 (1899).
\textsuperscript{8} Osborn \textit{v.} Auburn Telephone \& Telegraph Co., \textit{supra}; Burraill \textit{v.} Am. Telephone \& Telegraph Co., \textit{supra}.
\textsuperscript{9} Cosgriff \textit{v.} Tri-State Telephone \& Telegraph Co., 15 N. D. 210, 107 N. W. 525 (1916).
\textsuperscript{10} Hobbs \textit{v.} Long Distance Telephone Co., 147 Ala. 393, 41 So. 1003 (1908); Gates \textit{v.} N. W. Telephone Exch. Co., 60 Minn. 539, 65 N. W. 111 (1895).
\textsuperscript{11} Gurnsey \textit{v.} Northern California Power Co., 160 Cal. 599, 177 Pac. 906 (1911).
\textsuperscript{12} Maxwell \textit{v.} Central etc. Telegraph Co., 51 W. Va. 121, 41 S. E. 125 (1902).
\textsuperscript{13} Lowther \textit{v.} Bridgeman, 87 W. Va. 206, 50 S. E. 410 (1905).
\textsuperscript{14} Fox \textit{v.} City of Hinton, 84 W. Va. 239, 88 S. E. 478 (1918).
\textsuperscript{15} Gurnsey \textit{v.} Northern California Power Co., \textit{supra}.
property due to the proximity of a high voltage electric wire, a demurrer to the declaration was sustained.\textsuperscript{18} The case is not without authority. One court has held that even where the abutting owner has title to the fee in the street, he is not allowed compensation for increased danger of lightning, liability of wires to blow down or impediment to firemen.\textsuperscript{17} It would seem that this case presents one more of those unfortunate incidents where there is an actual damage but one for which the law does not provide a remedy.

Wires charged with a deadly current of electricity, while their danger is not apparent to the senses, cause death and injury daily and constitute a serious menace both as a cause of fire and an impediment to the fighting of fire.\textsuperscript{18} Such a hardship as that occasioned by the decision in the Karcher Case can be remedied. Where the safety of inhabitants and their property reasonably requires that wires shall be placed in underground conduits, such may be accomplished by a reasonable exercise of the police power.\textsuperscript{19} In proper cases, this important power should be used for the protection of the lives and property of the inhabitants of towns and cities. —H. C. H.

---

**REAL PROPERTY — CONVEYANCE OF SURFACE CONSTRUED.** — The Supreme Court of West Virginia, when recently called upon to decide whether or not the following clause:

"... all that surface of a certain tract or parcel of land containing 110 acres lying on the head waters of Dolls Run, Monongalia County, West Virginia, known as the tract of land that F. M. Meredith, guardian, etc., and Mary F. Morris conveyed to the said grantees on the 14th day of June, 1889, subject to ingress and egress and water privilege for drilling oil and gas wells on the same and the right to lay pipes to convey oil and gas therefrom or over the same, and to work upon said land in drilling said wells, or removing any or all machinery therefrom. . . ."'

in a deed passed the coal and mining rights, advanced the same-

\textsuperscript{17} Hewitt v. Western Union Telegraph Co., 4 Mackey 424, 2 Am. Elect. Cas. 222 (D. C. 1886).
\textsuperscript{18} See CURTIS, THE LAW OF ELECTRICITY, Ch. XII, p. 497.