Chapter 376

Ways of Necessity; Special Ways; Pedestrian Malls

376.105

NOTES OF DECISIONS

1. In general

Under a former similar statute, after the county court had acquired jurisdiction, it was presumed that the viewers were "disinterested freeholders" when the contrary was not shown. Towns v. Klamath County, (1898) 33 Or 225, 53 P 604.

Under former similar provisions, in so far as the establishment of a road from the timberland or timber of the owner to some public road was authorized by this section it was held unconstitutional, although the road might be of some benefit to the public. Anderson v. Smith-Powers Logging Co., (1914) 71 Or 276, 139 P 736.

Where, for consideration, the owner conveyed a "gateway" across his land, to be used as a "road of public easement," to a grantee entitled to a way of necessity, such words were used with a view to this section and allowed general public use of the way which could not be burdened by additional gates. Fendall v. Miller, (1921) 99 Or 610, 196 P 381.

An instruction that, if a convenient road could be laid out nearer than the point reached by the viewers then the road set out by the viewers could not be opened, correctly submitted the question of the proper location of the road. Re Application of Barton, (1924) 111 Or 111, 225 P 322.

No error resulted in the court's refusing to define the word "practicable" with reference to the location of a proposed road where the jury viewed the premises and had a common understanding of a practicable road. Id.

A gateway may not be used or substituted for a logging road which must be procured by the statutory procedure provided. Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918.

Where court order authorized defendant to establish right of way as near as practicable on plaintiff's west property line, even if parties and viewers were mistaken as to proposed way being on plaintiff's property, defendant could not construct a roadway upon another location arbitrarily selected by himself. Hanns v. Friedly, (1947) 181 Or 631, 184 P2d 855.

Where court order authorized defendant to establish way of necessity as nearly as practicable to west line of plaintiff's property, and west of plaintiff's house, defendant should have given plaintiff's house as a monument precedence over west property line where line was not definitely found. Id.

There was no need for evidence of ownership where defendant's answer admitted construction of roadway over plaintiff's land and plaintiff's possession raised a disputable presumption of ownership. Id.

2. Petition

Under former similar provisions, a petition was sufficient. Sullivan v. Cline, (1898) 33 Or 260, 54 P 154.

Under a former similar section a description of the termini was not required. Towns v. Klamath County, (1898) 33 Or 225, 53 P 604.

The address of the petition, under former similar provisions was proper, if it was entitled in the proper tribunal. Lesley v. Klamath County, (1904) 44 Or 491, 75 P 709.

A petition could not be regarded as one for the vacation of a road where it alleged a former roadway, but did not allege that it was a public road of any kind or that it had been closed by the authority of a court. Id.

Facts or statements other than those required were not necessary in the petition. Kemp v. Polk County, (1905) 46 Or 546, 81 P 240.

That a road did not extend into petitioner's premises after beginning at a county road, did not render the petition insufficient to confer jurisdiction on the county court. Hartley v. Sherman County, (1926) 119 Or 586, 250 P 740.

A petition showing that petitioner's land already bordered on a county road but that it could not be reached conveniently was sufficient to confer jurisdiction on the county court. Id.

FURTHER CITATIONS: Witham v. Osburn, (1873) 4 Or 318; Douglas County v. Clark, (1887) 15 Or 3, 13 P 511; Ray v. Davis, (1968) 249 Or 1, 436 P2d 741; Ray v. Davis, (1969) 254 Or 155, 458 P2d 679.

ATTY. GEN. OPINIONS: Authority of county clerk to collect fees from petitioner, 1938-40, p 658; gateway as within term "public road" in ORS 758.010, 1950-52, p 334; validity of proposed amendment broadening this section to include "recreation property," 1954-56, p 97.

LAW REVIEW CITATIONS: 19 OLR 171, 365; 36 OLR 274; 46 OLR 126.

376.110

NOTES OF DECISIONS

1. Location of road

Under former similar provisions, the report of viewers was sufficient to show that the route adopted was the best one in their judgment. Fanning v. Gilliland, (1900) 37 Or 369, 61 P 636, 67 P 209, 82 Am St Rep 758.

The road need not begin at the very house but could be so located as to afford convenient access to the premises under former provisions. Lesley v. Klamath County, (1904) 44 Or 491, 75 P 709.

The viewers were required to view and locate the easement petitioned for; it was not optional with them to locate either a road or a gateway. Id.

The "nearest point practicable on a public road" depends upon the situation presented to the viewers and the use made of the road by the people of the community. Re Application of Barton, (1924) 111 Or 111, 225 P 322.

Where the terminus of a road was located at a point that might be available for transporting fruit to market, it was a "point practicable on a public road." Id.

The extension of a proposed road into the petitioner's premises was not required, where it gave him egress from his farm and the public ingress to it. Hartley v. Sherman County, (1926) 119 Or 586, 250 P 740.

Where the beginning point of a proposed road was the

county road bordering petitioner's land, it was on petitioner's premises, since the premises extend to the center of the road. Id.

2. Damages

Under former similar provisions, the report of the viewers that the road was laid out with the least damage was not issuable. Fanning v. Gilliland, (1900) 37 Or 369, 61 P 636, 67 P 209, 82 Am St Rep 758.

Where a gateway only was established, the expense of fencing the road was not recoverable. In re Sage, (1909) 54 Or 587, 104 P 428.

Testimony of owner as to damages sustained was not erroneous. Hanns v. Friedly, (1947) 181 Or 631, 184 P2d 855.

FURTHER CITATIONS: Ray v. Davis, (1968) 249 Or 1, 436 P2d 741.

LAW REVIEW CITATIONS: 46 OLR 126.

376.115

NOTES OF DECISIONS

The county need not expressly be made a party to a petition for a writ of review directed to the court in a proceeding relative to the establishment of a road of public easement. Holland-Wash. Mortg. Co. v. County Court, (1920) 95 Or 668, 188 P 199.

The county court has the power to enter an order substituting a new route and increasing damages fixed by the board of viewers. Ray v. Davis, (1968) 249 Or 1, 436 P2d 741.

LAW REVIEW CITATIONS: 46 OLR 126.

376.120

CASE CITATIONS: Ray v. Davis, (1968) 249 Or 1, 436 P2d 741.

LAW REVIEW CITATIONS: 46 OLR 126.

376.125

LAW REVIEW CITATIONS: 46 OLR 126.

376.130

CASE CITATIONS: In re Sage, (1909) 54 Or 587, 590, 104 P 428; Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918.

LAW REVIEW CITATIONS: 46 OLR 126.

376.135

LAW REVIEW CITATIONS: 46 OLR 126.

376.145

NOTES OF DECISIONS

A franchise to construct and maintain a logging railroad upon a road was void where the road of public easement and the proceedings to establish it were void as an attempt to authorize the taking of private property for a private use. Anderson v. Smith-Powers Logging Co., (1914) 71 Or 276, 139 P 736.

LAW REVIEW CITATIONS: 46 OLR 126; 2 WLJ 342.

376.305 to 376.390

LAW REVIEW CITATIONS: 2 WLJ 342.

376.310

LAW REVIEW CITATIONS: 1 WLJ 459.

376.330

NOTES OF DECISIONS

It is not mandatory for a county court to permit a user to improve a county road. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

376.335

NOTES OF DECISIONS

It is not mandatory for a county court to permit a user to improve a county road. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

ATTY. GEN. OPINIONS: Authority of county court to contract with a logging operator to improve and maintain a county or public road, 1952-54, p 72.

376.340

ATTY. GEN. OPINIONS: Necessity of indemnity bond to protect county from suits by persons injured by overloading, 1952-54, p 143.

376.345

ATTY. GEN. OPINIONS: Obligation of a logging operator other than a forest road contractor for using contract forest roads, 1950-52, p 297; a forest road contractor waiving reimbursement of maintenance costs from other logging operators using the road where the other logging operators receive no benefit therefrom, 1950-52, p 379.

376.355

ATTY. GEN. OPINIONS: Necessity of indemnity bond to protect county from suits by persons injured by overloading, 1952-54, p 143.

376.365

LAW REVIEW CITATIONS: 1 WLJ 458.

376.505 to 376.540

LAW REVIEW CITATIONS: 2 WLJ 333-344.

376.505

NOTES OF DECISIONS

Prior to the enactment of this statute, a logging railroad was held not to have the right to condemn land. Flora Logging Co. v. Boeing, (1930) 43 F2d 145.

ORS 376.505 to 376.540 permit provisions of Ore. Const. Art. I, §18 to be carried into effect which, in the absence of an enabling statute, might not be considered self-executing. Coos Bay Logging Co. v. Barclay, (1938) 159 Or 272, 79 P2d 672.

A difference between the filed description of the approximate route and that in the complaint does not invalidate the procedure. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997.

The provision for filing a statement of approximate route is permissive, so failure to file is not demurrable. Id.

FURTHER CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

LAW REVIEW CITATIONS: 46 OLR 133.

376.510

NOTES OF DECISIONS

An allegation that a way is "reasonably necessary" is sufficient, without stating the evidentiary facts. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997; Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

This section, in so far as it authorizes the condemnation of land for logging railways, roads or ways, is constitutional. Flora Logging Co. v. Boeing, (1930) 43 F2d 145.

The right of eminent domain is derived from statutes, and a corporation should not be deprived of the right merely because it is not claimed in its articles of incorporation. Id.

"Any. . . corporation" includes foreign corporations. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997.

To determine "reasonable necessity" requires an examination of all pertinent factors, but necessity need not be tantamount to indispensability. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

If a necessary party is omitted from the proceeding, they are nugatory as to him, but this does not vitiate the proceeding as to those who are parties, nor can the latter complain of the omission. Id.

The statute does not require that all hope of negotiations be exhausted before suit is brought, but only seeks to insure that legal action is not too precipitous. Id.

Once plaintiff has shown necessity, defendant must show the chosen route is the result of fraud, bad faith or the abuse of discretion. Id.

District court should have determined whether right of way was to be exclusive or ordinary, as exclusive right of way might not be reasonable, and damages might be greater. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997.

Once plaintiff had shown it was "bottled up" because an apparent way was not practically available to it, it had made a prima facie case of necessity and it was for trial judge to say if it had sustained the burden of proof. Moore Mill & Lbr. Co. v. Foster, (1959) 216 Or 204, 336 P2d 39, 337 P2d 810.

FURTHER CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

LAW REVIEW CITATIONS: 46 OLR 133.

376.515

CASE CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

376.520

CASE CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

376.525

NOTES OF DECISIONS

If plaintiff's right of way were exclusive, or used for a logging railroad, defendant could show as damages its increased cost for a road on a less feasible route, and the cost of lifting its logs across plaintiff's road. Oregon Mesabi Corp. v. Johnson Lbr. Corp., (1947) 166 F2d 997.

The hazard of fire, not the reasonable certainty of its occurrence is the damage that must be compensated in allowing a logging road right of way. Id.

Test as to validity of an alleged element of depreciation of land value is whether it would tend to cause a prospective buyer to seek a lower price. Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

Increased hazards of fire arising from the presence of the railroad and increased likelihood that third persons would visit property and resulting prospect of higher insurance rates were elements properly submitted to jury. Id.

FURTHER CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918.

376.530

CASE CITATIONS: Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

376.535

CASE CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

376.540

CASE CITATIONS: Barkley v. Gibbs, (1947) 180 Or 647, 178 P2d 918; Georgia-Pac. Co. v. Miller, (1956) 208 Or 684, 304 P2d 428, 304 P2d 440, 304 P2d 441.

376.605

CASE CITATIONS: State Hwy. Comm. v. Pac. Shore Land Co., (1954) 201 Or 142, 269 P2d 512.

LAW REVIEW CITATIONS: 46 OLR 130.

376.615

ATTY. GEN. OPINIONS: Responsibility of county court to repair irrigation structures across county roads, 1950-52, p 242; power of county court to grant easement for irrigation ditch on the right of way of a county road, 1950-52, p 326.

376.780

LAW REVIEW CITATIONS: 46 OLR 131.