

## Chapter 772

### Rights of Way for Public Uses

#### Chapter 772

CASE CITATIONS: State Hwy. Comm. v. Bailey, (1957) 212 Or 261, 319 P2d 906.

LAW REVIEW CITATIONS: 46 OLR 1-187; 47 OLR 41.

#### 772.010

##### NOTES OF DECISIONS

See also cases under ORS chapter 35.

##### 1. In general

An easement is all that can be acquired by a taking of property for a right of way. Land can only be taken for the particular use for which it is sought to be appropriated. Oregon Ry. & Nav. Co. v. Ore. Real Estate Co., (1882) 10 Or 444.

Property already appropriated to public use could again be seized for a different purpose of the same kind. Little Nestucca Toll-Road Co. v. Tillamook County, (1897) 31 Or 1, 6, 48 P 465, 65 Am St Rep 802.

Lease of a county road to a toll road company was not an agreement executed under this section. Tillamook County v. Wilson R. Road Co., (1907) 49 Or 309, 89 P 958.

A telegraph company may condemn a right of way for its line over the right of way of a railroad company. Pacific Postal Tel. Cable Co. v. Ore. & C.R. Co., (1908) 163 Fed 967.

The grant of the power of eminent domain to municipal corporations is within the plenary power of the legislature. Yamhill Elec. Co. v. City of McMinnville, (1929) 130 Or 309, 274 P 118, 280 P 504.

##### 2. Purpose of taking property

The right of eminent domain can be exercised only for a use beneficial to the public. Bridal Veil Lbr. Co. v. Johnson, (1896) 30 Or 205, 210, 46 P 790, 60 Am St Rep 818, 34 LRA 368; Oswego D. & R. Co. v. Cobb, (1913) 66 Or 587, 135 P 181.

The question of whether a proposed use is a public one is a question of fact. Bridal Veil Lbr. Co. v. Johnson, (1896) 30 Or 205, 46 P 790, 60 Am St Rep 818, 34 LRA 368; Apex Trans. Co. v. Garbade, (1898) 32 Or 582, 52 P 573, 54 P 367, 882, 62 LRA 513.

The right granted to a corporation to exercise the power of eminent domain is available only to carry out the purpose of its organization. State v. Portland Gen. Elec. Co., (1908) 52 Or 502, 95 P 722, 98 P 160.

The taking of property for the line of a canal was for a public use. Dalles Lbr. Co. v. Urquhart, (1888) 16 Or 67, 19 P 78.

A former similar statute providing for the condemnation of a right of way did not authorize a street railway company to condemn private property for a right of way. Thompson-Houston Elec. Co. v. Simon, (1890) 20 Or 60, 25 P 147, 23 Am St Rep 86, 10 LRA 251.

Irrigation company seeking to condemn lands for irrigation system to supply water to landowners adjacent to its canal, and to irrigate land which it owned, was within the

requirements of the statute. Eastern Ore. Land Co. v. Willow R. Land & Irr. Co., (1913) 122 CCA 636, 204 Fed 516.

FURTHER CITATIONS: Oregonian R. Co. v. Hill, (1881) 9 Or 377.

#### 772.025

LAW REVIEW CITATIONS: 46 OLR 126.

#### 772.035

LAW REVIEW CITATIONS: 47 OLR 48; 3 WLJ 279, 280.

#### 772.050

LAW REVIEW CITATIONS: 47 OLR 48; 3 WLJ 279.

#### 772.055

##### NOTES OF DECISIONS

"Increased value" refers to the land to be appropriated and not to the residue, and the landowner cannot recover for damages to land not taken unless benefited over and above all damages. Oregon Cent. R. Co. v. Wait, (1889) 3 Or 91.

No provision for merely "securing" compensation for taking property under the right of eminent domain has been made. State v. Bradshaw, (1911) 59 Or 279, 282, 283, 117 P 284.

An owner cannot have any increased value which accrued to his land from a proposed improvement added to his damages, under the statute, and the condemnor cannot have such increased value treated as part of the compensation and deducted from the amount which would compensate if the land were purchased for any other purpose. Portland-Oregon City R. Co. v. Penny, (1916) 81 Or 81, 158 P 404.

The measure of damages for the taking of land for a railroad right of way is the actual cash market value of the strip taken and the incidental depreciation in the market value of the part not included in the right of way. Id.

OC-37-102 [ORS 772.015 to 772.055] does not apply to proceedings by the United States to condemn land in this state. United States v. Alcorn, (1936) 80 F2d 487.

The amount of compensation to be paid by the United States for property which it takes is to be determined, not by the law of the state, but by federal law. Id.

Evidence of what plaintiff paid for other property for use in the same enterprise was incompetent. Oregon R. & N. Co. v. Eastlack, (1909) 54 Or 196, 102 P 1011, 20 Ann Cas 692.

FURTHER CITATIONS: State Hwy. Comm. v. Bailey, (1957) 212 Or 261, 319 P2d 906.

LAW REVIEW CITATIONS: 46 OLR 151.

## 772.065

## NOTES OF DECISIONS

A railroad company which appropriated part of a county road for its right of way, under a contract with the county court to establish another road, but which failed to carry out its agreement, could not be required by the commission to construct a highway in lieu of the one appropriated. In re County Road No. 65, (1919) 90 Or 519, 177 P 426.

## 772.105

## NOTES OF DECISIONS

## 1. Subsection (1)

The appropriation of a public levee by a railroad corporation would defeat or extinguish the public use, and is not within the grant of power, without an agreement with the local authorities. Oregon Ry. v. Portland, (1881) 9 Or 231.

The mere execution of an agreement provided for by this section does not establish a corporate road; but location by some appropriate act by the corporation is essential. State v. Douglas County Road Co., (1882) 10 Or 185.

The use of a street by a railroad will not be enjoined at the suit of an abutting owner in the absence of proof that the construction and use of the railway will specially interfere with the owner's ingress and egress. Paquet v. Mt. Tabor St. Ry., (1889) 18 Or 233, 22 P 906.

A grantee of land bounded by a road or street does not secure such a title to the land embraced in the road or street as will enable him to claim compensation from a railway which locates its road thereon. McQuaid v. Portland & V. Ry., (1889) 18 Or 237, 22 P 899.

Any structure on a street which is subversive of its use as a public thoroughfare is not a legitimate street use, and imposes a new servitude on the rights of abutting owners for which compensation must be made. Willamette Iron Works v. Ore. Ry. & Nav. Co., (1894) 26 Or 224, 37 P 1016, 46 Am St Rep 620, 29 LRA 88.

Order of a county court did not give a railway a right to the exclusive use of a road, or deprive the public of the right to use any part thereof. Turney v. So. Pac. Co., (1904) 44 Or 280, 75 P 144, 76 P 1080.

## 2. Subsection (2)

A railway has no authority to change the grade of the highway, or use it to the exclusion of the public, or in such manner as will infringe upon the rights of adjoining property owners to its use. McQuaid v. Portland & V. Ry., (1889) 18 Or 237, 22 P 899.

Owners of property adjoining a highway are compelled to submit to ordinary inconveniences and annoyances which the operation of a railway located upon a public road occasions, but cannot be deprived of ingress and egress to and from their premises. Id.

An abutting owner may recover the amount of the depreciation of value of his property caused by the interference with the enjoyment of his property. Id.

This power of a city carries therewith the power to impose reasonable conditions to such grant which when accepted becomes binding upon the grantee. Southern Pac. Co. v. Portland, (1910) 177 Fed 958.

A city is not limited to designating the street upon which railroad tracks can be located, or the giving or refusing of consent, but may fix terms and reserve general powers, provided they do not defeat the state franchise. Southern Pac. Co. v. Portland, (1912) 227 US 559, 33 S Ct 308, 57 L Ed 642.

Power to designate the street on which tracks can be located is equivalent to the power to consent to the use of that street. Id.

FURTHER CITATIONS: Douglas County Road Co. v.

Abraham, (1874) 5 Or 318; Douglas County Road Co. v. Canyonville & Galesville Road Co., (1879) 8 Or 102; Canyonville & Galesville Road Co. v. Stephenson, (1880) 8 Or 263; Burns v. Multnomah R. Co., (1883) 8 Sawy. 543, 15 Fed 177; Little Nestucca Toll-Road Co. v. Tillamook County, (1897) 31 Or 1, 48 P 465, 65 Am St Rep 802; Tillamook County v. Wilson R. Road Co., (1907) 49 Or 309, 89 P 958.

## 772.210

## NOTES OF DECISIONS

A condemnor acquires only an easement by exercise of the power accorded in this section. Pacific Postal Tel Cable Co. v. Ore. & C.R. Co., (1908) 163 Fed 967.

The use of the word "lands" in designating the property that may be condemned does not mean that an interest less than the fee may not be obtained by virtue of the right accorded in this section. Id.

Under a former similar statute, the clause "if the lands are covered by trees" has reference to the lands which are to be condemned. Northwestern Elec. Co. v. Zimmerman, (1913) 67 Or 150, 135 P 330, Ann Cas 1915C, 927.

A complaint for the condemnation of trees menacing the right of way must show the necessity for their removal. Id.

The trees that may be condemned under this section must be adjacent to the right of way. Id.

FURTHER CITATIONS: Ashland Elec. Power & Light Co. v. City of Ashland, (1914) 217 Fed 158; California-Ore. Power Co. v. City of Medford, (1915) 226 Fed 957.

LAW REVIEW CITATIONS: 46 OLR 151.

## 772.215

ATTY. GEN. OPINIONS: County courts designating the location of electric power lines along county roads, 1944-46, p 210; franchise for coaxial television cable, 1954-56, p 153.

## 772.305

CASE CITATIONS: Smith v. Cameron, (1928) 123 Or 501, 262 P 942.

ATTY. GEN. OPINIONS: Condemnation of federal lands by State Land Board, 1948-50, p 358.

LAW REVIEW CITATIONS: 47 OLR 35; 3 WLJ 280, 281.

## 772.310

## NOTES OF DECISIONS

An appropriation of property by a private person under the power of eminent domain, occurring prior to this enactment, cannot be supported by it. Smith v. Cameron, (1928) 123 Or 501, 262 P 946.

LAW REVIEW CITATIONS: 3 WLJ 281.

## 772.410

## NOTES OF DECISIONS

The question whether a use is public is to be determined by the courts, independent of the object expressed in a charter or statute conferring the right to condemn. Apex Trans. Co. v. Garbade, (1898) 32 Or 582, 52 P 573, 54 P 367, 882, 62 LRA 513.

ORS 772.410 and 772.415 relate to the power granted to common carriers of freight and do not apply to one who is not a common carrier and who does not belong to that

class of corporations. *Flora Logging Co. v. Boeing*, (1930) 43 F2d 145.

A skid road built to facilitate logging was not subject to condemnation. *Apex Trans. Co. v. Garbade*, (1898) 32 Or 582, 52 P 573, 54 P 367, 882, 62 LRA 513; *Anderson v. Smith-Powers Logging Co.*, (1914) 71 Or 276, 139 P 736, LRA 1916B, 1089.

772.415

CASE CITATIONS: *Flora Logging Co. v. Boeing*, (1930) 43 F2d 145.

772.520

LAW REVIEW CITATIONS: 46 OLR 131.

