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Oregon Short Line Railroad Co. v. The Denver and Rio Grande Western Railroad Co. : Brief of Respondent

Utah Supreme Court

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In the
Supreme Court of the State of Utah

OREGON SHORT LINE RAILROAD
COMPANY, a corporation,
Plaintiff and Respondent,

vs.

THE DENVER AND RIO GRANDE
WESTERN RAILROAD COMPANY,
a corporation,
Defendant and Appellant.

FILED

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Clerk, Supreme Court, Utah
Case No. 7701

BRIEF OF RESPONDENT

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INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS FOR ARGUMENT	8, 9
ARGUMENT	9
I. A CORPORATION DOES NOT BECOME A COMMON CARRIER BY LEGISLATIVE FI- AT, PUBLIC SERVICE COMMISSION OR- DER OR BY PROVISIONS OF ITS CHARTER. IT MUST HAVE THE ATTRIBUTES WHICH IN LAW ARE ESSENTIAL FOR THE STAT- US OF A COMMON CARRIER. BUT UTAH LAW DOES NOT REQUIRE A CORPORA- TION TO BE A COMMON CARRIER TO EN- TITLE IT TO BRING AND PROSECUTE CONDEMNATION PROCEEDINGS	9
II. UNDER THE UTAH STATUTES AND CASES THE TAKING MUST BE FOR A PUBLIC PURPOSE	30
III. A RAILROAD COMPANY CANNOT CON- DEMN LAND FOR USES NOT CONNECTED WITH THE CONDUCT OF ITS BUSINESS OR REMOTE FROM PROPERTIES OWNED BY IT	40
IV. PLAINTIFF AND RESPONDENT BY LEAS- ING ITS PROPERTIES TO THE UNION PA- CIFIC RAILROAD COMPANY DID NOT LOSE ITS RIGHT TO CONDEMN, AND PLAINTIFF AND RESPONDENT DOES HAVE POWER AND AUTHORITY TO BRING AND PROSECUTE THIS CONDEM- NATION ACTION	43
CONCLUSION	61

INDEX—Continued

Page

AUTHORITIES CITED

Amador Queen Mining Co. v. DeWitt, 73 Cal. 482, 15 P. 74	36
Apex Transportation Co. v. Garbade, 32 Ore. 582, 52 P. 573	35
Beckman v. Lincoln & N. W. R. Co., 112 N. W. 348	53, 54, 55
Butte A. & P. Ry. Co. v. Montana U. Ry. Co., 41 P. 232	39, 40
Cereghino v. Oregon Short Line R. Co., 26 Utah 467, 73 P. 634	32
Cottrell v. Chicago T. H. & S. E. Ry. Co., 138 N. E. 504	40
Denver and Rio Grande Western Railroad Company v. Public Service Commission of Utah and Union Pacific Railroad Company, 230 P. 2d 557	34
Denver R. L. & C. Co. v. Union Pacific R. R. Co., 34 F. 386	24
Dietricks v. L. & N. W. R. Co., 13 N. W. 624	48, 49
Ft. Worth & D. C. Ry. Co. v. Ammons, 215 S. W. 2d 407	40
Garkane Power Co. v. Public Service Commission, 98 Utah 466, 100 P. 2d 571	11
Healy Lumber Co. v. Morris, 33 Wash. 490, 74 P. 681 .	36
Hercules Water Co. v. Fernandez, 5 Cal. App. 726, 91 P. 401	37
Lake Superior & Mississippi R. R. Co. v. United States, 93 U. S. 442, 23 L. Ed. 965	17, 18
Lower v. Chicago B. & Q. R. Co., 13 N. W. 718	50
McCarthy v. Public Service Commission, 111 Utah 481, 184 P. 2d 220	10

INDEX—Continued

	Page
Montaire Mining Co. v. Columbus Rexall Consolidated Mines Co., 53 Utah 413, 174 P. 172	36, 37
McPhee & McGinnity Co. v. Union Pacific R. Co., 158 F. 5	41, 42
Nash v. Clark, 27 Utah 158, 75 P. 371	38, 39
Nash v. Clark, 198 U. S. 361, 49 L. Ed. 1085, 25 S. Ct. 676	39
In re New York L. & W. R. Co. v. Union Steamboat Co., 1 N. E. 27	46, 47, 48
In re Niagara Falls & Whirlpool Ry. Co., 108 N. Y. 375, 15 N. E. 429	27, 28, 29, 35
North Carolina R. R. Co. v. Zachary, 232 U. S. 248, 58 L. Ed. 591, 34 S. Ct. 305	15, 16, 62
Town of Perry v. Thomas, 82 Utah 159, 22 P. 2d 343	39
Peterson Orchard Co. v. Southwestern Ark. Utilities Corp., 18 S. W. 2d 1028	61
Pine Martin Mining Co. v. Empire Zinc. Co., 11 P. 2d 221	61
Pioneer Coal Co. v. Cherry Tree and Dixonville R. Co., 116 A. 45	40
Postal Telegraph Cable Co. v. O. S. L. R. Co., 23 Utah 474, 65 P. 735	39
Renter v. Malin Water Co., 198 N. E. 442	61
Riden v. Philadelphia, Baltimore & Washington R. Co., 35 A. 2d 99	56, 57
Robertson v. Brooksville & I Ry. Co., 129 S. 582	58
Snyder v. Baltimore & O. R. Co., 60 A. 151	58, 59
State v. Nelson, 65 Utah 457, 238 P. 237	11
State v. Superior Court, 72 P. 89	51, 52, 53

INDEX—Continued

	Page
Stockdale v. Rio Grande Western Ry. Co., 28 Utah 201, 77 P. 849	32
Stratford Irrigation District v. Empire Water Co., 111 P. 2d 957, 44 Cal. App. 61	37
Strickley v. Highland Boy Mining Co., 200 U. S. 527, 50 L. Ed. 581, 26 S. Ct. 301	39
Sutter v. Nicols, 152 Cal. 688, 93 P. 872	37
Terre Haute & P. R. Co. v. Robbins, 93 N. E. 398	59, 60
United States v. Union Stockyards Co., 151 F. 919 .	19, 20, 21
Westport Stone Co. v. Thomas, 94 N. E. 406	40
Whitman v. Northern Central Railway Co., 127 A. 112	13

STATUTES CITED

Utah Code Annotated, 1943,	
Section 77-0-5	25, 44
Section 77-0-5 (3)	25, 44
Section 77-0-5 (9)	44, 45
Chapter 61, Title 104	22, 23
Constitution of the State of Utah	
Section 7, Article XII	13, 15
Section 12, Article XII	13

TEXTS CITED

Elliott on Railroads, Third Edition	
Section 2	12
Section 43	12
Section 1202	45
Section 1204	29, 30

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BRIEF OF RESPONDENT

STATEMENT OF FACTS

The Oregon Short Line Railroad Company will be referred to throughout this brief as the "Short Line"; the Union Pacific Railroad Company, as "Union Pacific"; The Denver and Rio Grande Western Railroad Company, as "Rio Grande"; and italics and other emphasis throughout is supplied by the writer of this brief, unless otherwise noted.

Except for the statement contained in the first two paragraphs at the bottom of page 1 and the top of page 2 of appellant's brief, respondent disagrees with the facts as stated by appellant; or, more particularly, it might be said that appellant has misstated some of the facts and has stated as facts conclusions that are not warranted by the pleadings or evidence in the case. Therefore, except for adopting said first two paragraphs, respondent will give a further statement of facts involved in this case.

The Oregon Short Line Railroad Company is a Utah corporation which owns a line of railroad, which, insofar as may be material in this case, extends from McCammon, Idaho, to Sandy, Utah (R. 166). In addition to its road-bed and terminals, and contrary to the claim of appellant throughout the case, the Short Line does at the present time (or as of April 1, 1951) own rolling stock, including something in excess of 2,000 freight cars, a little less than 100 passenger cars, and 134 locomotive engines (R. 122-125; Ex. W, X, Y, and AA).

Although the Short Line has been in existence as a railroad corporation for a considerable period in excess of fifty years (Ex. A) and has operated as such through the states of Utah and Idaho and elsewhere, nevertheless it did, under the effective date of January 1, 1936, lease its entire railroad properties to the Union Pacific Railroad Company (Ex. C). That lease is now in force and effect and has not been terminated in any way (R. 86). Appellant stated that the lease was for one hundred years but the evidence shows the contrary. The lease itself (Ex. C) provides (Sec. 8, page 8) :

“8. TERM OF LEASE

“This lease shall become effective on the first day of January, 1936, and shall continue in effect until December 31, 1936, and from year to year thereafter until terminated by either party, by at least three months’ notice in writing of its election to terminate the same at the end of the calendar year then current, and either party shall have the right to terminate this lease as aforesaid. This lease and the provisions of the several sections hereof shall be construed as if, for each year, a separate lease was made and entered into containing the provisions hereof, but only for the fixed term of one year, and all of the payments to be made by Lessee under any of the several sections of this lease shall constitute rental for the year in which the Lessee shall become obligated to make the same.”

Thus, the lease is nothing more than a year-to-year lease subject to termination at any time by either party by the giving of three months’ notice.

Said lease further provides (Sec. 5, page 5) :

“* * * The Lessee assumes and agrees to perform and observe all obligations of the Lessor under any and all leases, trackage contracts, franchises, ordinances, easements, licenses and other contracts demised, assigned and transferred to the Lessee by this lease, or to which the demised premises or any part thereof may be subject; provided that all expenditures by the Lessee in performance of any of the aforesaid obligations which are chargeable to investment accounts shall be charged to and reimbursed by the Lessor, and that any moneys or other considerations received by the Lessee under any of said leases and contracts which are properly

creditable to investment accounts shall inure to and become the property of the Lessor."

* * * * *

"The Lessee agrees to operate the demised premises and to maintain the same in a proper state of repair, and to bear all cost and expense thereof chargeable to operating expenses. * * *"

With specific reference to additions or betterments, new trackage or other improvements on the railroad, with specific reference to condemnation as is involved in this case, the lease provides:

"The Lessee shall have the right to construct or acquire any additions to and betterments or extensions of the demised premises which it may deem desirable in the interest of the demised premises as a whole or advantageous in the operation thereof. All such additions, betterments and extensions made upon or to any part of the demised premises owned by the Lessor shall become and be a part of the demised premises and the property of the Lessor and the Lessor shall reimburse the Lessee to the extent of the cost incurred by it therefor chargeable to property investment accounts. Upon the request of the Lessee, from time to time, the Lessor will, to the extent of its rights and powers, permit to be instituted and prosecuted in its name proceedings in the exercise of the right of eminent domain or otherwise for the acquisition of additional property, rights of way, rights to cross, intersect or connect with other railroads, * * * or public highways, which shall be deemed necessary or desirable for the purpose of additions to or betterments or extensions of the demised premises. * * * For the purpose of reimbursing the Lessee for the cost of additions to and betterments and extensions of the demised

premises chargeable to the Lessor, less credits upon abandonment, retirement, destruction and sales of property, under the foregoing provisions of this article, the Lessor, from time to time during the term of this lease, will, subject to any necessary governmental approval, upon request of the Lessee, make, execute, issue and deliver to the Lessee in such amounts as may be necessary for the purpose aforesaid bonds, notes or other evidences of indebtedness, as the Lessee shall elect, bearing such rates of interest and payable at such times as the parties hereto shall determine, and, if so requested by the Lessee, secured by mortgage upon the demised premises or any part thereof."

On page 3 of his brief counsel for the appellant states that the Short Line has no other officers, agents or employes "excepting only F. C. Paulsen * * * who is * * * general manager . * * * but whose sole function as such has been and is the signing of leases for the Oregon Short Line Railroad Company." Counsel does not state the facts or the record properly. The evidence concerning Mr. Paulsen is that he is General Manager of the Union Pacific, as well as the Oregon Short Line, properties within the State of Utah and the designation as general manager in and of itself would indicate that he would have such rights and duties as normally would be exercised by any general manager. Counsel for appellant attempted to infer by his questionings of the witnesses that as general manager he had nothing to do, but the only testimony with respect thereto was that of Mr. Bachman, who stated with respect to his duties, "*Primarily* it is to execute leases and contracts on behalf of the corporate property, the corporate

company, the Short Line" (R. 87). This testimony, in spite of what counsel made an attempt to infer from it, does not say that that was his "sole function". With respect to other officers, contrary to what appellant states on page 3, the Short Line does have other officers. Arthur E. Stoddard is President of the Short Line and Ambrose J. Seitz is Vice-President of the Short Line (R. 82, 83). E. G. Smith is Secretary of the Short Line, as well as Secretary of the Union Pacific (R. 101). Thus, the testimony is without dispute that the Short Line does have other officers, including not only the ones referred to but also including a board of directors, which is active in the conduct and management of the affairs of the Short Line, as shown by Exhibit F.

Counsel for appellant has made several conclusions which we do not think are warranted by the evidence, and then has taken such conclusions as a premise to argue from and thereby, in our opinion, entirely confuses or attempts to confuse the issue in this case. On page 2 of his brief he states, first, that the Short Line is a Utah corporation and then, as a conclusion, states, "but that it has not operated as a common carrier in any particular since January 1, 1936." Again, on page 3 of his brief he states, "Since January 1, 1936, Oregon Short Line Railroad Company has not carried any freight or passengers or engaged in any activities whatever as a common carrier". In his statement of points, paragraph 1, at the bottom of page 3, he states that the court should have found that it "has not been since January 1, 1936, engaged as a common carrier". Then, on page 4 of his brief, counsel states a conclusion as

a single question of law and the "point upon which appellant relies for reversal of judgment" that "a corporation does not have the power of eminent domain as a railroad corporation under Utah law unless it is engaged as a common carrier". This is appellant's premise, and is a false premise and counsel does not anywhere throughout the entire course of his brief cite even one case to support such a proposition.

Under this "point upon which appellant relies" counsel states three propositions for argument. We will answer the three points as set out in counsel's argument to the extent that we feel they must necessarily be answered but, in addition to the three points posed for argument by counsel, we wish to set forth a fourth point for argument which, in our opinion, is the main issue in the case and which is the one issue which counsel has stressed from the first day pleadings were filed in the case, regardless of his present attempt to becloud the issues, and that point, or main issue, is: Does a railroad corporation, lawfully incorporated under the laws of the state and which has operated railroad properties and has operated a railroad as such for many years, cease to be a railroad or a railroad corporation by virtue of leasing its properties to another railroad and does it by such lease cease to have the power or authority to exercise eminent domain under the laws of the State of Utah? Respondent contends and will argue to the point that the plaintiff and respondent by virtue of its lease to Union Pacific did not lose its right to prosecute condemnation and that plaintiff and respondent as it is presently circumstanced is authorized to prosecute this action in con-

demnation within the State of Utah. Incidental thereto and by way of answer to other points raised by appellant, respondent does and will continue to insist that the Short Line is a common carrier, although being a common carrier is not one of the requisites necessary to entitle it to eminent domain under the Utah law.

STATEMENT OF POINTS FOR ARGUMENT

I.

A CORPORATION DOES NOT BECOME A COMMON CARRIER BY LEGSLATIVE FIAT, PUBLIC SERVICE COMMISSION ORDER OR PROVISIONS OF ITS CHARTER. IT MUST HAVE THE ATTRIBUTES WHICH IN LAW ARE ESSENTIAL FOR THE STATUS OF A COMMON CARRIER. BUT UTAH LAW DOES NOT REQUIRE A CORPORATION TO BE A COMMON CARRIER TO ENTITLE IT TO BRING AND PROSECUTE CONDEMNATION PROCEEDINGS.

II.

UNDER THE UTAH STATUTES AND CASES THE TAKING MUST BE FOR A PUBLIC PURPOSE.

III.

A RAILROAD COMPANY CANNOT CONDEMN LAND FOR USES NOT CONNECTED WITH THE CONDUCT OF ITS BUSINESS OR REMOTE FROM PROPERTIES OWNED BY IT.

IV.

PLAINTIFF AND RESPONDENT BY LEASING ITS PROPERTIES TO THE UNION PACIFIC RAILROAD COMPANY DID NOT LOSE ITS RIGHT TO CONDEMN, AND PLAINTIFF AND RESPONDENT DOES HAVE POWER AND AUTHORITY TO BRING AND PROSECUTE THIS CONDEMNATION ACTION.

ARGUMENT

I.

A CORPORATION DOES NOT BECOME A COMMON CARRIER BY LEGSLATIVE FIAT, PUBLIC SERVICE COMMISSION ORDER OR PROVISIONS OF ITS CHARTER. IT MUST HAVE THE ATTRIBUTES WHICH IN LAW ARE ESSENTIAL FOR THE STATUS OF A COMMON CARRIER. BUT UTAH LAW DOES NOT REQUIRE A CORPORATION TO BE A COMMON CARRIER TO ENTITLE IT TO BRING AND PROSECUTE CONDEMNATION PROCEEDINGS.

Respondent will agree with the first sentence of appellant's first point, which is that a corporation does not become a common carrier by legislative fiat, public service commission order or by provisions of its charter. The only thing we would answer to such an argument is, "So what." The right of eminent domain under the Utah laws is not

given to common carriers, and the appellant is wrong in assuming that the question of whether a corporation is or is not a common carrier is a prerequisite or something that must be shown as a basis to entitle it to condemnation, and none of the cases cited by counsel states, or even tends to support, such a proposition. Therefore, we must disagree with the second sentence of appellant's first point of argument if appellant contends that a corporation must be a common carrier to entitle it to condemnation. We will agree that neither a corporation nor an individual can be either in law or in fact a common carrier unless such corporation or individual holds itself or himself out to the public as being willing to undertake for hire to transport persons or commodities generally for the entire public, or has been so engaged in transporting and holding out to transport for the public generally. The case of *McCarthy v. Public Service Commission*, 111 Utah 481, 184 P. 2d 220, had no reference whatsoever to condemnation but merely held that neither the public service commission nor anyone else could declare a person (including corporation in such designation as person) to be a common carrier as a result of past performances unless he had actually transported for the public generally and held himself out to transport for the public generally. When there has been no past performance showing such a person to be a common carrier, the court stated that a need would have to be shown from which the commission could find public convenience and necessity for such a person or corporation to offer his or its services and hold out to the public to transport generally. Again, we say there was no question of condemnation but merely the point

that a common carrier is one who holds himself out to carry generally for the public or who is engaged in a general public service, with the right of the public to use his facilities.

The case of *State v. Nelson*, 65 Utah 457, 238 P. 237, goes to the same point and involves merely a question as to whether there was shown in the case the element of public service necessary to show that Nelson, who was charged with being a common carrier, was serving and carrying all persons indiscriminately or indifferently who had applied for transportation. Nelson, not having held himself out or engaged in such business, was not a common carrier.

The case of *Garkane Power Co. v. Public Service Commission*, 98 Utah 466, 100 P. 2d 571, is to the same effect, and the power company involved in that case was held not to be subject to the commission's jurisdiction because "it does not propose to service the public generally but only to serve its members."

We assume that counsel cited or intended to cite and quote from these cases in an attempt to show that the Short Line does not hold itself out to serve the public generally or does not serve the public generally and therefore is not a common carrier. Appellant must still show the connection and show wherein it is necessary, under the laws of the State of Utah, to be a common carrier to entitle one to prosecute an action in condemnation, but this respondent did not in any manner show.

While we admit the statement that a corporation does not become a common carrier by legislative fiat, public service commission order or by provisions of its charter, we

think that a different rule would apply with respect to a constitutional provision, and we also wish to point out in this case that both by our constitution and by statutes in the State of Utah railroads are placed in a somewhat different category than other corporations, both with respect to general law and to the laws governing eminent domain. By the very grant of its corporate charter a railroad corporation has imposed upon it certain duties and responsibilities which continue to be duties and obligations of such railroad corporation as long as it continues to be a corporation, regardless of whether it leases its properties to some other company for operation or not, and, different from other corporations, railroad corporations are declared by our Utah Constitution to be common carriers and all properties and franchises owned and held by them within the state must be at all times kept available to perform common carrier service, whether by the railroad corporation which owns the property or by another who operates it as agent or contractor. *Elliott on Railroads*, Third Edition, Section 2, page 6, states with respect to railroads:

“* * * They are now usually organized under general laws. They are given certain prerogative franchises and privileges for public purposes in return for which the state retains a right of supervision and control, in excess of that exercised over purely private corporations. In the very grant of the franchise there is, in effect, an implied condition that it shall be held as a public or quasi public trust * * *.”

Section 43, page 75:

“Railroads, by whomsoever constructed or owned or operated, are quasi public works and are often likened by the courts and writers to public highways.

The constitution and laws of some states declare them to be public highways; those of others declare the companies to be common carriers whose roads are available to all persons for the transportation of themselves and their property. This latter definition expresses most nearly the relation of a completed railroad to the public."

Section 12 of Article XII of the Constitution of the State of Utah provides:

"All railroad and other transportation companies are declared to be common carriers, and subject to legislative control; * * *"

Section 7 of Article XII of the Constitution of the State of Utah provides:

"No corporation shall lease or alienate any franchise, so as to relieve the franchise or property held thereunder from the liabilities of the lessor, or grantor, lessee, or grantee, contracted or incurred in operation, use or enjoyment of such franchise or any of its privileges."

Whitman v. Northern Central Railway Co. (Md.), 127 A. 112. In this case the appellate court of Maryland had before it directly, as one of the main points of appeal, the question as to whether or not the Northern Central, which had leased all of its properties to the Pennsylvania Railroad Company, was or could be considered as a common carrier. The case was not a condemnation case but did involve directly the question as to whether or not such a lessor railroad continued, nevertheless, to be a common carrier. The opinion states:

"In 1914 the Northern Central Railway Company leased that entire system to the Pennsylvania Railroad Company for 999 years. * * *"

The lease in question had many provisions similar to the lease involved in this case. We quote from the opinion, after the recital of the facts:

"Upon these facts, the appellant contends: First, that the appellee is not a carrier * * *

"The contention that the appellee is not a carrier is based upon the theory that since under the lease the actual work of transporting persons and property is performed by the lessee, the lessor has lost its status as a carrier. But we think that contention involves too narrow a construction of the word 'carrier'; for while the lessee does perform the actual work of transportation over the leased system of railroads, the lessor still has important duties and functions to perform in connection with that transportation in which the public has a vital and immediate interest and which are necessarily predicated upon and assume its continued status as a carrier. Under the terms of the lease it has the right, and under the laws of the state it is charged with the duty, of requiring the lessee to maintain the leased property in such a condition as may be necessary to enable it to render adequate and efficient service to the public, and also to require that the lessee during the continuance of the lease manage and operate the leased property in the same manner as the lessor 'is now or shall and may at any time hereafter, be required by law to do.' * * *

It was originally chartered as a carrier, it was organized as a carrier, until the lease referred to it operated a railroad system as a carrier, it is still required to discharge many duties as a carrier, it is now

organized to act as a carrier, and in the event of default on the part of its lessee it must again actively operate its railroad system as a carrier. Under those circumstances, it remains now, as it originally was, a common carrier."

The Supreme Court of the United States has likewise so held. *North Carolina R. R. Co. v. Zackary*, 232 U. S. 248, 58 L. Ed. 591, 34 S. Ct. 305. This case involved damages for the death of an employe and the question was whether or not the railroad company was subject to the Federal Employers' Liability Act as a common carrier in interstate commerce. In that case the Supreme Court of the United States pointed out that under North Carolina Law "* * * a railroad corporation cannot evade its public duty and responsibility by leasing its road to another corporation * * *." Such holding is rather uniformly followed by most of the states, and we are certain that the provisions of Section 7 of Article XII of the Utah Constitution would require a similar holding with respect to the Short Line Company.

In the Zachary case, the defendant North Carolina R. R. Co. was an intrastate railroad. However, all of its lines were leased and operated by the Southern Railway Company under a lease executed in 1909. The North Carolina courts held that the case was not within the Federal Employers' Liability Act, and the United States Supreme Court stated:

"It is not disputed that if the provisions of the Federal act had been applied, the result of the action might have been different."

The defendant had contended throughout "that at the time of the occurrence in question defendant, *through its lessee*, was a common carrier by railroad engaged in interstate commerce. * * *." The U. S. Supreme Court held:

"In order to bring the case within the terms of the Federal act (35 Stat. 65, c. 149, printed in full in 223 U. S., p. 6), defendant must have been, at the time of the occurrence in question, engaged as a common carrier in interstate commerce, and plaintiff's interstate must have been employed by said carrier in such commerce. If these facts appeared, the Federal act governed, to the exclusion of the statutes of the State. * * *"

The Supreme Court referred to the fact that the North Carolina court had based its decision, among other reasons, upon the ground "that the corporation itself is not, although its lessee is, engaged in interstate commerce * * *." The United States Supreme Court held that the state court erred in holding that the Federal Employers' Liability Act had no application and reversed the North Carolina Supreme Court, stating:

"* * * although a railroad lease as between the parties may have the force and effect of an ordinary lease, yet with respect to the railroad operations conducted under it, and everything that relates to the performance of the public duties assumed by the lessor under its charter, such a lease—certainly so far as concerns the rights of third parties, including employees as well as patrons—*constitutes the lessee the lessor's substitute or agent*, so that for whatever the lessee does or fails to do, whether in interstate or in intrastate commerce, the lessor is responsible. This being the legal situation

under the local law, it seems to us that *it must and does result, in the case before us, that the lessor is a 'common carrier by railroad engaging in commerce between the States.'* * * *

We confidently assert that under the foregoing authorities, including our constitutional provisions, there is no escape from the conclusion that the Oregon Short Line Railroad Company is at this date and at the present time a common carrier, although its duties and responsibilities as such common carrier and the transportation which makes it a common carrier are being carried on for it by its lessee as its "substitute or agent," pursuant to the contract of lease entered into January 1, 1936.

A case which we think is interesting and enlightening upon this entire subject is the case of *Lake Superior & Mississippi R. R. Co. v. United States*, 93 U. S. 442, 23 L. Ed. 965. An act of Congress in making a land grant for railroads provided that the United States should have free use of the railroad as a public highway "free from all tolls or other charge for transportation of its property or troops." The question arose as to whether the word "railroad" included rolling stock, so that no charge could be made for actual transportation, or whether the government could be charged for use of rolling stock if it did not have its own to move over the road. The railroad company transported goods and troops for the government and then went into the Court of Claims to ask for reasonable compensation therefor. The Court of Claims decided against the railroad company but the judgment was reversed by the Supreme Court of the United States. The Supreme Court gave a considerable recital of

the history of railroads and a comparison of railroads with toll roads, turnpikes and canals. The court said:

“It is undoubtedly familiar to most of those whose recollection goes back to that period, that railroads were generally expected to be general highways upon which every man who could procure the proper carriages and apparatuses would have the right to travel.”

It was stated that some early laws concerning railroads provided that the company should have power to prescribe the kind of carriage to be used on its road, by whom and whether to be propelled by steam or other power. With respect to the act of Congress, the United States Supreme Court also said:

“All that the act reserves is the free use of the railroad. Of course, this implies also the free use of all fixtures and appurtenances forming part of the road and which are essential to its practical use, such as turn tables, switches, depots and other necessary appendages * * *.”

“Equally untenable is the idea that, because railroads are not ordinarily used as public highways, therefore the appellation of ‘public highways’ when given to them must mean something different from what it has ever meant before, and must embrace the rolling stock with which they are operated and used. Such a method of interpretation would set us all at sea, and would invest the courts with the power of making contracts, instead of the parties to them. * * * Where, as in the laws under review the railroad is referred to throughout in its character as a road, as a permanent structure, and designated and required to be a ‘public highway,’ it cannot, without doing violence to the language, and disregarding the

long established useage of legislative expression, as shown in the previous part of this opinion, be extended to embrace the rolling stock or other personal property of the railroad company."

The decree of the Court of Claims was reversed and a new decree directed allowing compensation for the transportation.

United States v. Union Stockyards Co., 161 F. 919. The defendant Union Stockyards Company was charged, under the acts of Congress, with violation of the safety appliance acts because it transported over its railways and roadbed a locomotive and engine with defective couplers. The defendant contended that it was not a railroad and not a common carrier and therefore not subject to the safety appliance acts. The defendant owned about 35 miles of trackage and roadbed in and around the Omaha stockyards, connecting with various railroads and with livestock pens and packing houses. The defendant had a few locomotives of its own and operated them upon the tracks. It had 3 flatcars used for handling refuse and cinders over its own tracks and 1 box-car used as a tool storage car. "None of these cars are (were) carried beyond the defendant's premises." The defendant handled with its locomotives cars of all kinds from all railroads into the slaughter pens and other yards, packing plants and hauled both loaded and empty cars out.

"Over the 35 miles of track of the defendant is handled all the live stock consigned to commission agents and others who supply the 5 meat packing houses of South Omaha, one of the greatest centers of that industry in the United States * * *. The

live stock handled over defendant's road amounts to about 625 cars per day."

With respect to freight rates and tariffs, the Federal Court stated:

"* * * The defendant quotes no rates for the carriage of freight, whether live stock or dead freight, but collects all of the freight charges on incoming live stock, when not prepaid, as an accommodation to the railroad companies, and it pays this amount over weekly to the railroad companies. The defendant collects no freight charges on outgoing live stock or dead freight. The charges of the defendant to the railroad companies for service rendered the railroad companies are paid for by the railroad company requesting the service to be performed. These charges are fixed and definite, under a contract with the railroad companies. The charges for taking in empty cars and taking out loaded cars are always the same, and these charges are not fixed with reference to the distance outgoing freight is to be carried or incoming freight has been carried, but are simply arbitrary charges fixed by the contract between the railroad companies and the defendant. Defendant does not join with any of the railroad companies in fixing the amount of charges for carrying freight out of the yards to points outside of the yards, nor as to freight carried from outside of the defendant's yards into its yards, nor does the defendant join with any railroad company in making any tariff charges for the carriage of freight at all, nor does it receive any portion of the money due from freight bills for carrying freight in or out of the defendant's yards. * * *. The charges made for handling the cars in the method above described are arbitrarily fixed at 50 cents, \$1, and \$2 per car.
* * *

“The defendant contends that it is not subject to the (safety appliance) acts * * * that it is not a common carrier and is not engaged in interstate commerce by railroad. * * *

“A railroad has been defined as a road or way on which iron rails are laid for wheels to run on for the conveyance of heavy loads and vehicles * * *. Such a track is a railroad independently of the use made of the track in the hauling of cars over it, as was pointed out in *L. S. & M. R. Co. v. U. S.*, 93 U. S. 442, 23 L. Ed. 965.

“In this case the road is not a mere switch maintained for the private purpose of the defendant, nor are cars delivered to the consignees when they are set upon the transfer track, and therefore an essential part of the transportation of the cars and freight therein contained is unfinished. * * *

“* * * The defendant, having chosen to devote its railroad tracks to a public use, must be held to be a common carrier. * * *

Thus, in this case the stockyards company was held to be both a railroad and a common carrier.

We would like at this point also to refer the court and counsel to a fact which we think is common knowledge, and that is that the American Express Company is held to be a common carrier, although the transportation of express and merchandise for such express company is performed for it under contract by various railroads throughout the United States.

We confidently assert that the plaintiff and respondent Oregon Short Line Railroad Company is a common carrier. However, we think that as far as the condemnation action

involved herein is concerned, the collateral question as to whether or not the respondent is a common carrier is immaterial and is not properly an issue upon which it was necessary for the court to make any finding. It is true that the plaintiff alleged in its complaint for condemnation that it was a common carrier. That allegation, we think, was immaterial. The complaint also stated that plaintiff was a corporation organized and existing under and by virtue of the laws of the State of Utah as a railroad corporation, and we think that the evidence is conclusive to prove such allegation.

In connection with this point of argument, we wish to refer to the Utah law with respect to eminent domain. Chapter 61 of Title 104, Utah Code Annotated, 1943, is the general statute with respect to eminent domain. The first section in that chapter sets forth the uses for which eminent domain may be prosecuted. We would like to call the court's attention to the fact that the power of eminent domain by said Chapter 61 is not given to any "common carrier." It is not given to any corporation, association, or individual as such, but that law states that "the right of eminent domain may be exercised *in behalf of the following public uses*," and then follows 14 subparagraphs setting forth various "public uses" for which eminent domain may be exercised, and in not one single instance is that right under said Chapter 61 given to any individual or to any corporation or other entity in any respect.

The statute says: The power "may be exercised in behalf of the following public uses." Exercised by whom? By any one who can show a proper public use. IT IS THE

PROPER PUBLIC USE AND NOT THE INDIVIDUAL OR CORPORATION OR OTHER ENTITY SEEKING TO CONDEMN WHICH IS IMPORTANT UNDER THIS STATUTE. A public use for which eminent domain may be exercised under that statute, as specified, is: "(4) * * * railroads * * * for public transportation." That does not say that it is given to a railroad corporation (as Section 77-0-5 does), nor that it is given to a railroad company or any transportation company which may prove that it is a common carrier, but the right of eminent domain may be exercised for the use of or to provide "railroads * * * for public transportation." The industrial track which plaintiff is seeking to extend into the area involved in this action is a "railroad" to be used for "public transportation." There are numerous cases holding that such a spur or industrial track is a part of a "railroad," and comes within the designation or definition of "railroad" under such a statute. Therefore, the use sought by plaintiff and respondent in this action is a use authorized by said Chapter 61 and the question as to whether plaintiff is a common carrier is entirely beside the point and begs the issue.

We call attention to the other subsections of section 1, Chapter 61. Even with counties and other municipal bodies, Chapter 61 does not give the right of eminent domain to the county or city, but the right of eminent domain may be exercised for "public buildings and grounds *for the use of* any county, city or incorporated town, etc." With mining companies, the right of eminent domain is not given to the mining companies as such, but under subsection 6 the right is given for roads, railroads, tramways, etc., *to facilitate*

the *milling, smelting, or other reduction of ores or the working of mines*, etc. These references to our statute show the theory upon which the law of eminent domain rests, and as was said in the case of *Denver R. L. & C. Co. v. Union Pacific R. R. Co.*, 34 F. 386:

“It is the object to which the land is to be devoted and not the party claiming the right to take land, that is required to be public.”

Again, in the same case:

“The inquiry is not as to what the company was organized for, or whether it will be a private or public corporation, but what the road will be,—the structure itself,—if any such thing shall be made. * * * It may be a question of inquiry to be determined as matter of fact, whether the road, when built, will be a public or private road, and the question will be the same whether the road shall be built by a corporation or by an individual. That question does not in any way appertain to the other, by whom the road is built. It is a question what the road itself is, not as to the character, or the quality of the builder.
* * * ”

Thus, again we say that while we do not agree with counsel in his charge that the respondent is not a common carrier, **AND WE ASSERT THAT IT IS A COMMON CARRIER**, we nevertheless urge that under our eminent domain law the question of whether plaintiff and respondent is or is not a common carrier is immaterial.

With respect to this action, different than may be true in cases involving mines, irrigation projects, logging roads or otherwise, we have a separate statute particularly ap-

plying to railroads. That is why earlier in this brief we stated that railroads, by virtue of our constitution and laws in this state, are somewhat in a class by themselves. Section 77-0-5, Utah Code Annotated, 1943, provides:

“Every railroad corporation organized under the laws of this state shall, except as otherwise provided in this title and subject to the limitations and requirements hereof, have all the rights, privileges and powers, and be subject to all the duties and obligations, of corporations organized for pecuniary profit, and in addition thereto such railroad corporation shall have the following powers:

* * * *

*“(3) To enter by its servants upon the real property of any person for the purpose of selecting an advantageous route for its main line or any extension or branch thereof, or for the purpose of relocating the same, subject to responsibility for all damages resulting therefrom; and to condemn in the manner required by law a right of way * * *.”*

Thus, in addition to what is provided by the general law with respect to eminent domain, our statutes provide that every railroad corporation organized under the laws of this state shall have the power to condemn property for a right of way.

It cannot be disputed that the Short Line is a “railroad corporation organized under the laws of this state”. And, as is shown by Exhibit A, it was such a corporation certified to be in good standing by the Secretary of State of the State of Utah at approximately the date of commencement of trial herein. As such, neither the corpora-

tion itself nor any of such a corporation's usual and ordinary rights and powers are subject to collateral attack in such a proceeding as this.

The appellant has not shown, or attempted to show, in any way, why, under this provision of the statute, the plaintiff and respondent should not now be authorized to prosecute this condemnation action. The statute in plain terms gives it that power, regardless of any argument on behalf of counsel with respect to officers, agents, conductors, etc., or whether or not it is a common carrier. It cannot be disputed that the property owned and held by it is being used for railroad purposes and for purposes of performing the duties of a common carrier and is so being used under contract by the lessee as "substitute or agent" for and on behalf of the lessor. We call attention to the provisions of paragraph 8 of the lease which provides that the contract may be terminated on short notice. The lessor, under the laws already quoted, cannot relieve itself of the duties and obligations which are imposed upon it under its franchise as a corporation, and in addition to those duties and the possibility that the lease can be and may have to be cancelled on short notice, whereby the respondent would resume full operation, there are other provisions in the lease which require certain duties to be performed currently, either upon request of the lessee or otherwise, in connection with transfers of property, adjusting accounts, and reimbursing lessee for costs of additions and betterments, even to the extent of issuing new bonds or other evidences of indebtedness if that should be necessary. (See paragraph 7 of the lease as quoted hereinabove.)

Counsel for appellant quotes and seems to place considerable reliance in his brief upon the case of *In re Niagara Falls & Whirlpool Ry. Co.*, 108 N. Y. 375, 15 N. E. 429, and on page 8 of his brief states:

“The court of appeals of New York has held that a railroad corporation must be a common carrier * * *.”

That statement is not true. The question as to whether or not the Niagara Falls & Whirlpool Ry. Co. was a common carrier was not even raised or discussed in that case, and the words “common carrier” were not even used therein. The question as to whether or not such railroad was a common carrier was not the basis of a decision in that case, but the basis of opinion of the New York Court of Appeals was that *the use proposed* by the Niagara Falls & Whirlpool Ry. Co. *was not a public use* and therefore the railway company was not entitled to condemnation. The New York court did state that if the use is not a public use the question as to whether or not the railway company has assumed in its articles of association the character of an ordinary railway association is immaterial, but the question of the nature of the railway corporation was not the issue involved in that case but the issue was as to whether or not the use sought was a public use, and we wager that if the *Niagara Falls & Whirlpool Ry. Co.* had been seeking to build an ordinary railroad to transport freight traffic, or, having some such railroad, if it had sought to build a spur track or industrial lead as is involved here, we are sure that the New York court of appeals would have held the use to be a public use and the decision would have been

different than it was in that case. The question of whether the use was public was not precluded by the fact that the plaintiff was a railroad corporation. The same is true here. The mere fact that the plaintiff is a railroad corporation, even under Section 77-0-5(3), would not be sufficient to authorize plaintiff and respondent to condemn if the use herein sought was not a public use because even that fact only gives such a railroad corporation authority to condemn "in the manner provided by law," and the law relating to condemnation provides that the use must be such as is considered to be a public use. It is interesting to note that, while appellant quoted rather extensively from the *Niagara* case, after italicising a portion, appellant left out some of the text in his quote toward the bottom of page 10 of his brief, and the portion left out by appellant reads as follows:

"What is a public use is incapable of exact definition. The expressions 'public interest' and 'public use' are not synonymous.."

The court then goes on to state:

"* * * The ground upon which private property may be taken for railroad uses, without the consent of the owner, is primarily that railroads are highways furnishing means of communication between different points, promoting traffic and commerce, facilitating exchanges; in a word, they are improved ways. In every form of government the duty of providing public ways is acknowledged to be a public duty. In this state the duty of laying out and maintaining highways has, in the main, been performed directly by the state or by local authorities; but, from an early day, the legislature has,

from time to time, delegated to turnpike corporations the right and duty to maintain public roads in localities, and canal companies have been organized with powers of eminent domain. It would be impracticable, and contrary to our usages, for the state to enter upon the business of constructing and operating railroads, and, in analogy to the delegation of the power of eminent domain to turnpike and canal companies, it wisely delegates to corporate bodies the right to construct and maintain railroads as public ways for the transportation of freight and passengers, and, as incident thereto, the right to take private property under the power of eminent domain on making compensation. * * *

Thus, the issue in the *Niagara* case was not as to the nature of the corporation itself because appellee, the Niagara company, in its organization had qualified in that respect, but the question was whether or not the use was a public use. And the court in that case concluded that:

“The fact that the road of the petitioner may enable the portion of the public who visit Niagara falls more easily or more fully to gratify their curiosity, or that the road will be public in the sense that all who desire will be entitled to be carried upon it, is not sufficient, we think, in view of the other necessary limitations, to make the enterprise a public one, so as to justify condemnation proceedings.
* * *

On page 11 counsel for appellant quotes from *Elliott on Railroads*, Third Edition, Section 1204, and we admit the statement there quoted as good law, but appellant does not say and does not point out in the case at bar wherein it might claim that the particular scheme in which plaintiff

and respondent is here engaged is not a railroad enterprise or that the taking is not for a public purpose but in the final analysis appellant's argument is only that the plaintiff is not authorized to do the taking and, yet, he cites no law to support such a proposition. Immediately preceding the quotation which appellant takes from Section 1204 of *Elliott on Railroads*, Third Edition, and the beginning of Section 1204 reads:

“A railroad company which is charged with the performance of the duties of a common carrier is, as we have seen, so far a public enterprise that it may be empowered to condemn the grounds needed for the construction and maintenance of its line.”

We have already referred to the fact that the respondent herein is, not only by law but by our state constitution, charged with the performance of these public duties and cannot evade them by lease or otherwise, and, of course, there was no intent to evade them by the lease.

II.

UNDER THE UTAH STATUTES AND CASES THE TAKING MUST BE FOR A PUBLIC PURPOSE.

We are surprised at appellant's counsel in setting forth such a heading for argument or in attempting to argue on such a point. We have already referred to the eminent domain statute and agree that it is the use that is important and that use must be a public use. We wish to point out to the court that in the findings of fact, by finding No.

22 (R. 54, 55), the trial court found that "the use to which plaintiff intends to put said property hereby sought to be condemned is a public use authorized to plaintiff by law and the right sought hereby is necessary to such use". By its conclusions of law, conclusion No. 3 (R. 56), the trial court concluded: "That the use to which plaintiff proposes to apply the property and right of way sought herein is a public use and is authorized by law." The appellant has not, either in its "Statement of Points Upon Which Appellant Will Rely," as served immediately subsequent to the Notice of Appeal, nor anywhere in its brief or argument, attacked such finding and conclusion of the court, nor in any way attempted to point out wherein such a finding or conclusion would not be substantiated by the evidence, if it is plaintiff's claim that it was not so substantiated. In its "Designation of Portions of the Record, Proceedings and Evidence to be Contained in Record on Appeal," the appellant did not request that there be included in the record and certified to this court any of the evidence given by public witnesses owning property in the area involved who testified that they needed the trackage, wanted the trackage, and had requested that the trackage be extended into the area for their benefit and that the trackage when extended would be contiguous to and serve their properties. For this reason the appellant has not properly certified to nor brought to this court the question as to whether or not the use proposed by plaintiff and respondent was or was not a public use and has in no manner attacked the court's findings or conclusions or the evidence upon such subject.

In its Statement of Points (R. 72, 73), and as repeated on pages 3 and 4 of its brief, the appellant contended that plaintiff and respondent was not a common carrier, that the district court should have found that it was not engaged in the rendering of public service, and that the district court should have concluded, therefore, that plaintiff and respondent was not entitled to condemn and that therefore the judgment is against law because respondent is not engaged in the rendition of any public service. THERE IS NO QUESTION WHATSOEVER RAISED AS TO WHETHER OR NOT THE USE PROPOSED BY PLAINTIFF WAS FOR A PUBLIC PURPOSE, OR WHETHER SUCH PROPOSED USE WAS OR WAS NOT A PUBLIC USE.

We do not wish to waive our right to object to this failure on the part of appellant to properly present such question to this court on appeal, but we cannot see the materiality nor the reason for the citing and quoting from the cases referred to by counsel on pages 11 to 17, inclusive, of his brief. We do not wish to allow the matter to go unchallenged for that reason, and we will therefore make brief reference to some of the cases which may bear upon such subject. We feel that we do not need to go to any jurisdiction outside the State of Utah because this court has on numerous occasions gone into considerable detail as to what may or may not be considered as a public use within our Utah statutes. Counsel cites and quotes, on page 12 of his brief, from the cases, *Cereghino v. Oregon Short Line R. Co.*, 26 Utah 467, 73 P. 634, and *Stockdale v. Rio Grande Western Ry. Co.*, 28 Utah 201, 77 P. 849.

Neither of such cases was a condemnation case but they arose on injunction proceedings in such a way that they can be directly applied. The *Cereghino* case was first in time, and in that case the Short Line sought to extend a track to serve the Con. Wagon & Machine Company. It was admitted that only the one industry could or would be served, and therefore the court held that the spur track was for the convenience and accommodation of a private business. The Rio Grande learned a lesson from the *Cereghino* case, and in the *Stockdale* case, while the evidence seemed to point rather conclusively to the fact that the only industry that was available or could be served by the Rio Grande spur was the brewing company, nevertheless the Rio Grande produced testimony that it would serve anyone who applied and the spur would be available to all and, thus, being open to the public generally, the court held that it was a public use and, as quoted by counsel, the court stated that if all persons and business institutions which may have occasion to do so, be permitted to use it and the track will be open to the public use generally, "if so then it is a public utility". Again we state that the evidence in this case did show much more strongly than was shown in the *Stockdale* case that it will be open to the use by the public generally. Nevertheless, counsel for appellant did not see fit to certify to this court the evidence that would so show. There were a number of witnesses who appeared and testified that they had requested that this trackage be extended into this area to serve their properties, and the evidence was that it would serve all property owners in the area or all who sought service from it. There

were other witnesses in addition to the same witnesses who appeared before the Public Service Commission of Utah in Case No. 7597, entitled, *Denver and Rio Grande Western Railroad Company v. Public Service Commission of Utah and Union Pacific Railroad Company*, 230 P. 2d 557, wherein this court held that the Public Service Commission had rightly found that public convenience and necessity existed sufficient to warrant the action taken by the Commission in that case. We wonder if appellant by inference does intend to argue that the trial court erred in its finding and conclusion that the use involved herein was a public use. If so, why did not counsel attack the finding and the conclusion and refer to the evidence if the evidence did not support such finding and conclusion, and why did he not designate and request all evidence be certified to this court if he intended to argue on such a point?

If counsel intends to base his argument solely on the lack of power or authority in plaintiff to prosecute condemnation actions, we have no quarrel with him as far as the record he has brought to this court is concerned, but on that question we think the issue is not what the articles of incorporation may show and not whether or not the plaintiff and respondent is a common carrier, but does plaintiff and respondent have the right to condemn. We insist that the plaintiff is a railroad corporation under the act contained in Title 77 of our statutes and that, beyond that, the defendant and appellant cannot launch any collateral attack upon the rights of the plaintiff corporation as such and the sole question then would be whether or

not the plaintiff, having leased its properties, can nevertheless still prosecute an action in condemnation.

In the case of *Apex Transportation Co. v. Garbade*, 32 Ore. 582, 52 P. 573, cited by counsel on page 16 of his brief, there is the statement that no declaration of the objects and purposes of a company in its charter can aid it in a condemnation case. We again call attention to the fact that in such case the only question involved was whether the use proposed was a public use, and we admit, and will reiterate, as was true in the case of *Niagara Falls Whirlpool Ry. Co.*, if the use proposed is not a public use, nothing contained in the articles or charter of a company can aid the corporation in taking the property sought. But the question thus involved is the question of public use and not the question as to the authority or power of the corporation, and if the use proposed is a public use authorized by law and if the corporation is one having right by law to prosecute condemnation, then the *Niagara* case and *Apex Transportation* case and others cited by counsel can have no application.

In the *Apex Transportation Co. v. Garbade* case, the company was organized to construct a skid road but the court found that the principal portion of its road had not even been surveyed or definitely located and that over the portion in question "when constructed the only practical use to which it can be put will be the transportation of logs for this mill company, and for no other, * * *." Thus, the question at issue there was a question as to whether or not the use proposed was a public use and not whether

the transportation company was entitled to condemn otherwise.

In *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 P. 681, a logging road was held not to be a public use on the basis that the law providing that such logging road would be a public use was unconstitutional under a constitutional provision which stated:

“Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such without regard to any legislative assertion that the use is public.”

The court in that case found:

“An examination of all the different constitutions in the union shows that only two other states, viz., Colorado and Missouri, have the provision of our constitution * * *.”

Again we say, however, that the holding of the court was that the use was not a public use.

In the case of *Amador Queen Mining Co. v. DeWitt*, 73 Cal. 482, 15 P. 74, the plaintiff tried to condemn a right of way through defendant's tunnel and was denied that right by the California court. We do not believe that such a holding would be followed by the California court today. Nevertheless, regardless of that fact, such case is exactly contrary to the case of *Montaire Mining Co. v. Columbus Rexall Consolidated Mines Co.*, 53 Utah 413, 174 P. 172, wherein the plaintiff sought and was granted the right of

condemnation to use jointly with defendant a tunnel owned by defendant. In that case this court stated:

“We think it is generally agreed that where the right of eminent domain is granted for a particular purpose, then the statute must be given a liberal construction in furtherance of such purpose.”

The case of *Hercules Water Co. v. Fernandez*, 5 Cal. App. 726, 91 P. 401, involved again a question as to whether the use was a public use, and the condemnor in that case did not comply with the statute but tried to broaden the purposes as stated in the statute.

Sutter v. Nicols, 152 Cal. 688, 93 P. 872, was not a condemnation case but a case where one operating a mine was enjoined from dumping tailings and refuse in a stream, causing the stream to overflow on plaintiff's land.

The case of *Stratford Irrigation District v. Empire Water Co.*, 111 P. 2d 957, 44 Cal. App. 61, takes a more liberal view than earlier cases, and that case states, similar to what we have hereinabove quoted from the *Montaire Mining* case, as follows:

“It has been held that where the legislature declares a particular use to be a public use the presumption is in favor of its declaration and the courts will not interfere therewith unless the use is clearly and manifestly of a private character.”

We wish to refer again to the fact that the question as to whether or not the use proposed by plaintiff and respondent is a public use is not before this court and the cases cited by counsel have been cited apparently to sup-

port the proposition that a proposed use cannot be aided by any declaration of the objects and purposes stated in the charter of the company or by any legislative act. We did and do agree with that statement, and we are not trying, and did not try in the trial court, to prove that the use proposed by plaintiff and respondent was a public use by reference to plaintiff's articles of incorporation or anything of a similar nature. The court found and concluded that the use proposed by plaintiff was a public use and such finding is not assailed, and the only point that appellant has raised or can raise in connection therewith is appellant's argument that plaintiff, having leased its line, is not entitled to file condemnation.

With respect to the question of public use, however, we do wish to refer briefly to the following cases, in addition to the *Stockdale* and *Cereghino* cases cited by counsel.

Nash v. Clark, 27 Utah 158, 75 P. 371. This was a suit by one man to condemn a right of way to enlarge and use an irrigation ditch, and the sole question was whether this was a public use. The holding of this court is enlightening with respect thereto:

"There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempts to lay down any fixed rules as a guide to be followed in all cases. One class of authorities in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right

to the actual use in some way of the property appropriated; whereas, the other line of decisions holds that it is a public use within the meaning of the law when the taking is for a use that will promote the public interest and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject we are of the opinion that the class of decisions last mentioned are more in harmony with enlightened public policy, and the liberal interpretation given the term 'public use' which the legislature has, in effect, declared shall be followed in this state, is far more conducive to individual and public advancement than the restricted construction adopted and followed by the line of decisions first referred to."

This case was affirmed in the Supreme Court of the United States in *Nash v. Clark*, 198 U. S. 361, 49 L. Ed. 1085, 25 S. Ct. 676. See, also, *Strickley v. Highland Boy Mining Co.*, 200 U. S. 527, 50 L. Ed. 581, 26 S. Ct. 301, wherein the *Strickley* case referred to by appellant was affirmed by the Supreme Court of the United States. See, also, *Town of Perry v. Thomas*, 82 Utah 159, 22 P. 2d 343; *Postal Telegraph Cable Co. v. O. S. L. R. Co.*, 23 Utah 474, 65 P. 735.

Butte A. & P. Ry. Co. v. Montana U. Ry. Co. (Mont.), 41 P. 232. Plaintiff railroad sought to condemn portions of defendant's right of way not actually possessed and used by defendant to provide an extension for plaintiff's road and for spurs to mines in the Butte area. There were several crossings of the defendant road involved. We quote from the opinion of the Montana Supreme Court:

"It is well established that if, in point of law, a use is public, the fact that not many persons will

enjoy the use is not material * * *. The character of a way, whether it is public or private, is determined by the extent of the right to use it and not by the extent to which that right is exercised. If all the people have the right to use it, it is a public way, although the number who have occasion to exercise the right is very small * * *. The circumstance that the plaintiff road was built by a private corporation and that its branches are not within convenient contiguity of private mines or ore houses, does not materially affect the road and give a private character to its use or to the use of its spurs. All termini of tracks and switches are more or less beneficial to private parties, but the public character of the use of the tracks is never affected by this. 'It may be in such cases that it is expected, or even that it is intended, that such tracks will be used almost entirely by the manufacturer; yet if there is no exclusion of an equal right of use by others and the singleness of use is simply the result of location and convenience of access, it cannot affect the question' * * *."

See, also, *Cottrell v. Chicago T. H. & S. E. Ry. Co.* (Ind.), 138 N. E. 504; *Westport Stone Co. v. Thomas* (Ind.), 94 N. E. 406; *Pioneer Coal Co. v. Cherry Tree & Dixonville R. Co.* (Pa.), 116 A. 45; *Ft. Worth & D. C. Ry. Co. v. Ammons* (Tex.), 215 S. W. 2d 407. These cases are in accord with the *Stockdale* case and other Utah cases hereinabove cited.

III.

A RAILROAD COMPANY CANNOT CONDEMN
LAND FOR USES NOT CONNECTED WITH
THE CONDUCT OF ITS BUSINESS OR RE-
MOTE FROM PROPERTIES OWNED BY IT.

Under this heading appellant has cited one or two cases but has not attempted to point out how any of the authorities apply to the case at bar. We admit that the Short Line could not condemn property for a right of way which was not connected with its tracks nor with the business transacted over its tracks by its lessee, the Union Pacific. It is the Short Line that owns the tracks and the property with which the industry track connection in question will be made, and it is the Short Line's business being conducted by its lessee that would be affected by the track in question.

See *McPhee & McGinnity Co. v. Union Pacific R. Co.* (Colo), 158 F. 5. The city of Denver granted a franchise or license to the Union Pacific to construct a spur track along Blake Street in Denver to a proposed area where industries and warehouses were to be built but were not yet located in the area. The franchise along Blake Street ran from 19th to 27th Streets. Plaintiffs were owners of property fronting on the street and sought to enjoin the construction of the railroad spur on the basis that it was purely a private enterprise and not a public use. We quote from the opinion:

“This railroad company had an established line of railroad through the city of Denver and the tracks upon Blake Street authorized by the ordinance were spur tracks from its main track for the benefit of parties who expected to build warehouses on vacant property abutting on that street * * *.”

“The suggestion that the license was unauthorized because the tracks were not for public but for private use cannot prevail. In a sense every spur to

a private warehouse, manufacturing or trading establishment, is for private use of those who own and conduct the business therein but in a larger sense and in the true sense every such railroad track is for the public use and for the public benefit, because it enables the public to exchange its commodities for those of the parties who conduct their business upon the track in a more facile and economical way. It reduces the price of the articles carried to the consumer and it increases commerce."

It will be noted that the federal court in this Colorado case referred to the fact that the Union Pacific "had an established line of railroad through the city of Denver" and that the proposed tracks "were spur tracks from its main track." The Union Pacific does not own the railroad in question here. The Short Line owns the main line track from which the proposed spur would extend and owns the properties involved from McCammon, Idaho, on the north to Sandy, Utah, south of Salt Lake. The Union Pacific owns a line of railroad in its own right and not as lessee, extending east from Ogden, Utah, but only operates the properties in question here for the Short Line under lease. We are definitely certain that if a condemnation action had been filed in the name of the Union Pacific, wherein the Union Pacific itself had sought to condemn a right of way for trackage anywhere in the Salt Lake area, the defendant would have immediately protested that "a railroad company cannot condemn land for uses not connected with the conduct of its business as a common carrier," and that the Union Pacific had no railroad in the Salt Lake area and was not entitled in any manner to condemn property for

railroad purposes in the Salt Lake City area. It would be the same as if either the Union Pacific or the Short Line had attempted to condemn land somewhere in Carbon County, Utah. Neither has any railroad properties or conducts railroad business there, and neither would have the right to condemnation of property anywhere in Carbon County, even though they may attempt to allege that such condemnation was for railroad purposes or other public uses.

In the case at bar, however, the properties are properties of the Short Line and are operated for the Short Line by the Union Pacific by virtue of the lease, and authorities which state that a railroad company cannot condemn land for uses not connected with the conduct of its business are not in point. The cases cited on pages 18 and 19 of counsel's brief refer to property needed for construction of dwellings for employes and property desired for a park. These cases clearly cannot be in point and appellant has not cited any case that would be in point upon its argument with respect to common carrier, or otherwise.

IV.

PLAINTIFF AND RESPONDENT BY LEASING ITS PROPERTIES TO THE UNION PACIFIC RAILROAD COMPANY DID NOT LOSE ITS RIGHT TO CONDEMN, AND PLAINTIFF AND RESPONDENT DOES HAVE POWER AND AUTHORITY TO BRING AND PROSECUTE THIS CONDEMNATION ACTION.

As we have heretofore set forth, this point No. IV is one posed by respondent and not by appellant but, in our opinion, is the real point at issue and the issue upon which appellant's counsel performed the major burden of his labors as far as the trial court is concerned. Throughout the trial of this case counsel for appellant has insisted and repeated that plaintiff and respondent is not a common carrier, it is not a railroad company, it does not perform the duties of a railroad, it has disposed of all its property by lease and therefore is not entitled to condemnation. The major portion of what counsel has otherwise argued in appellant's brief tends only to cloud the issues. We have already stated and quoted authority herein to show that the plaintiff and respondent is a common carrier; that the railroad transportation being performed by Union Pacific is being performed by that company for and on behalf of the lessor, the Short Line.

We have heretofore quoted provisions of Section 77-0-5, Utah Code Annotated, 1943, which sets forth that, *in addition* to rights, privileges and powers held by ordinary corporations "such railroad corporations shall have the following powers," and then sets forth 14 separate subparagraphs of additional powers. We have quoted the provisions of Section 77-0-5(3), which give the right and power to a railroad corporation, under the laws of Utah, to condemn property for a right of way. Subparagraph (9) of that same Section 77-0-5 provides that such a "railroad corporation organized under the laws of this state" shall also have the right and power

“to lease, sell, convey and transfer its property and franchises or any part thereof to any railroad corporation not owning any competitive line in this state * * *.”

If a railroad corporation such as is referred to in that section ceases to be such a railroad corporation with the powers therein enumerated when it leases its property, as is the contention of appellant, THEN SUCH A RAILROAD CORPORATION DOES NOT HAVE THE POWER TO LEASE AND THE STATUTE THUS GIVING IT THAT RIGHT WOULD BE INEFFECTIVE AND AN ABSOLUTE NULLITY. If a railroad corporation organized under the laws of the State of Utah is by the same law and the same section given the right to prosecute actions in condemnation and also given the right to lease its properties, then it cannot be argued that if such a corporation does lease its properties it is no longer a railroad corporation entitled to condemnation. We think that this statute in and of itself is a complete and entirely sufficient answer to the contention of appellant herein. Nevertheless, the authorities are quite numerous which go to support the position taken by plaintiff and respondent and which are, without dispute or dissent, opposed to and directly contrary to the position taken by the defendant and appellant herein.

Elliott on Railroads, Third Edition, Volume 2, Section 1202, page 706. Right to Condemnation where road is leased:

“Right to condemn where road is leased or in hands of a receiver.—It is said that personal rights and privileges granted to a corporation can only be exercised by its board of directors or other govern-

ing body. The power of eminent domain is granted as a personal trust, and can not be delegated or transferred without legislative sanction; accordingly, it is held that neither the purchasers, nor the lessees, of a railroad can exercise the right without express authority. And, where its road can not be successfully operated without the acquisition of the property sought to be condemned, a company which has leased all its property and franchises may exercise the right of eminent domain, even though the lease is for the entire life of the corporation and the property is taken solely for the use of the lessee. It has been held that a railroad company, leasing the property and franchises of another, the corporate identity of the lessor being maintained, may exercise the power of the lessor to widen its roadbed, though the exercise of the power is practically for the benefit of the lessee. * * *

In re New York L. & W. R. Co. v. Union Steamboat Co., 1 N. E. 27. The plaintiff sought to condemn land for railroad purposes. However, the plaintiff did not operate its road but the road was operated under a lease by another company. We quote from the opinion:

“It is further objected that the petitioner has lost its right to condemn lands by reason of its lease for the full period of its corporate life to the Delaware, Lackawanna & Western Railroad Company, a corporation organized under the laws of Pennsylvania. We do not understand that the validity of this lease, as between the contracting parties, is seriously questioned. * * * It must be treated as valid for the purpose of the objection, since, if invalid, the question raised practically disappears. The ground insisted upon is that the lessor company, having parted with the entire control of its road for the full

period of its existence, cannot longer be said to require any additional lands for its purposes, but such land could only be required for the purposes of the lessee. We are to observe precisely what the question is. If it is a legal possibility that the lessor company could need or require the property for its corporate uses, the question of fact whether in truth it did so need it was litigated and decided on the evidence favorably to the petitioner, and with sufficient reason. But the contention here is, as matter of law, that such necessity could not by possibility survive the lease. Upon that point we think the case of *Kip v. New York & H. R. Co.*, 67 N. Y. 227, should control our conclusion. There the lessor company had instituted proceedings for the condemnation of land. During the pendency of such proceedings it leased its road to another company, and all its rights, franchises, and privileges, for the term of 401 years. Thereafter the land-owner brought an action to restrain the further prosecution of the condemnation proceedings, upon the precise ground taken here, that, because of the lease, the lessor company could not possibly need or require under the law the property sought.

“The decision was adverse to that contention. The court said that the same necessity existed after as before the lease, ‘and it is legally appropriate to affirm that it exists in favor of the defendant, notwithstanding the lease.’ The appellant’s criticism upon that case is that both parties were domestic corporations, and here one is not. That is immaterial to the inquiry. If the lease here is valid, the debated question is the same; and whether the lessee company is a foreign corporation or not is of no consequence, for such lessee is not here seeking to condemn lands for itself. If the lease is void, then the lessor company stands like any other domestic railroad company seeking to acquire lands for its own purposes.

If any justification of the case cited is needed, it may be found in the fact that section 21 of the railroad act, as amended many times, evidently contemplates the acquisition of lands by companies which have leased their roads, and in the further consideration that, *by its lease, the lessor company in no respect escapes from or lessens its corporate duty to the state, but is continuing the performance of that duty through the agency of its lessee*, and may at any time, through the failure of the latter to perform its covenant obligations, or by its absolute loss of corporate life and existence, become repossessed of its line and property, and bound to operate it for itself; and that, to the proper performance of its duty by itself, or through its lessee, the acquisition of lands or terminal facilities may be necessary and essential."

Dietricks v. L. & N. W. R. Co. (Neb.), 13 N. W. 624.

Defendant filed condemnation proceedings to secure property for depot and yard purposes in the city of Columbus, Nebraska. The plaintiff then filed this case, seeking an injunction against defendant to block the condemnation proceedings. It was shown that the defendant's lines and property were all leased to the Chicago B. & Q. R. R. Co., and it was contended that, therefore, the L. & N. W. Co. had no right to condemn. Incidentally, in that case it was argued that proper officers of that company had not authorized the proceedings. The trial court denied the injunction and the Nebraska Supreme Court affirmed. We quote from the opinion:

"It is also urged that certain testimony given by the witness Post as to what was done and said by E. A. Touzalin, the general manager of the company, in directing the location of the tracks and depot grounds, and as to the necessity of taking this lot, ought to

have been excluded. Much of this testimony was admitted without objection; but even that which was not, was clearly admissible under the pleadings, especially in view of the charge made in the petition that the proceedings in condemnation were not directed by any competent authority, but by persons whose only relations to the company was merely that of attorneys at law. * * *. We are of opinion that, in the location of depot and other grounds of a railroad company, and in fixing their extent, the decision of the general manager of the company, who, as this official designation fairly implies, and the evidence clearly shows, 'had charge of all its business,' including the construction of its road and buildings, is *prima facie*, and, in the absence of all evidence to the contrary, a just measure of what is essential to the convenient and proper conduct of its business, and sufficient to warrant the exercise of the power of eminent domain in its behalf. * * *"

* * * * *

"It appears that the defendant company, prior to the commencement of the proceedings to condemn this lot, had, by lease for a term of years, transferred to another company 'all of the property and franchises' which it then owned or might thereafter acquire. This lease, it is urged, had the effect to deprive the defendant of the right, even if it would otherwise have had it, to exercise the power of eminent domain, and that therefore the finding of the referee in this respect was erroneous. We think this objection is untenable. The lease expressly provides that the defendant shall 'do and perform any and every corporate act which may be necessary, useful, or appropriate to secure to' its lessee 'the full enjoyment of * * * every franchise, right, easement, power, and privilege' which it then possessed or might thereafter acquire; and that it would also,

to this end, maintain its corporate organization. The condemnation of this lot for the purpose of the company is certainly a corporate act, and, if essential to the convenient and proper use of its road by the lessee, is one which, by the terms of the lease, the defendant was bound to perform upon request. And, besides, there is no authority for proceeding in any other name than that of the defendant company."

Lower v. Chicago B. & Q. R. R. Co. (Iowa), 13 N. W. 718. The Chicago, Burlington & Quincy R. R. Co. was seeking property to double track its line through a portion of Iowa. A question was raised as to its power to condemn, inasmuch as it was a foreign corporation and not an Iowa corporation. It caused to be formed under the laws of Iowa the Chillicothe & Sheriton R. R. Co., which then brought the condemnation. The plaintiffs sought an injunction against both railroads. It appeared that the new Iowa corporation adopted a survey already made by the Chi. B. & Q., and it was shown that the new company had leased the new road in question to the Chi. B. & Q., and the Burlington was doing the actual construction of the road. The trial court dismissed the petition, and the Iowa Supreme Court affirmed the judgment. We quote from the opinion:

"A corporation has all the power expressed in its articles of incorporation or charter, and all other powers reasonably incident to the exercise of the expressed powers, unless restricted by some statute or rule of law. * * *

"* * * If, then, the Chicago B. & Q. R. R. Co. lacks the power to build such road * * * the Chillicothe & Sheriton R. R. Co. can build the road and that, too, even though it derives all its means from the Chicago B. & Q. R. R. Co. and builds it

with the express design of leasing it to that company.”

State v. Superior Court (Wash.), 72 P. 89. The Seattle & Montana Railroad Company was a railroad corporation organized under the laws of the State of Washington. It sought to condemn lands “for the purpose of tracks and a cite for terminal buildings and facilities.” This Seattle company did not actually operate its properties but they were operated under lease by the Great Northern Railway Company. The public service commission authorized condemnation, and the owners of the land involved brought the matter to the Supreme Court by certiorari. The Washington Supreme Court stated :

“* * * we think the petitioner also satisfactorily proved that the premises were required and necessary for the purposes specified, namely, a right of way for its tracks and a site for a passenger station and for platforms, warehouses, etc. But it was shown by the testimony of the petitioner’s engineer that the petitioner is not the owner of any locomotives or cars, and that it does not operate its railroad, but the same is operated by the Great Northern Railway Company, under some kind of an agreement between them, the terms of which were not disclosed by the evidence. * * *”

In spite of the objection of the property owners, the trial court found that the contemplated use was a public use and that the Seattle company was entitled to proceed with the condemnation. In confirming the trial court, the Washington Supreme Court said :

“It is also objected that the respondent the Seattle & Montana Railroad Company has no right to condemn this property for the purposes indicated in its petition, because it appears from the evidence that it has no rolling stock of its own, does not operate its road, and does and will permit the Great Northern Railway Company and other railroad companies to run their passenger and freight trains over its line into Seattle, and to use its depot and terminal grounds there situated. In other words, it seems to be claimed that the proof shows that the respondent company is seeking, through the exercise of the power of eminent domain, to take the property of these realtors not for its own use and benefit, but for the use and benefit of other corporations. We think this objection is wholly untenable. Under what agreement or understanding between the two companies the respondent’s railroad is used and operated by the Great Northern Railway Company, or upon what terms and conditions the cars of other railroad companies are or may be transported over its road, is not disclosed by the evidence; but, whatever the arrangement is under which this may be done, it cannot be presumed to be illegal. *Indeed, it is not only the right, but the duty, of the Seattle & Montana Railroad Company, under the law and the Constitution of this state, to permit such use of its road by other railroad companies.* Ballinger’s Ann. Codes & St. Sec. 4318; Const. art. 12, Sec. 13. *And, if it be true that said company has leased its railroad to the Great Northern Company, or any other company or companies, or agreed to do so, it is not thereby precluded from condemning and appropriating private property for a public use, which may be necessary for its tracks, side tracks, depots, etc.* In re Metropolitan E. Ry. Co., *supra*; Crolley v. Ry. Co., 30 Minn. 541, 16 N. W. 422; Mayor v. Railway Co., 109 Mass. 103; in re New York, etc., R. Co., 99 N. Y. 12, 1 N. E. 27;

Chicago, etc., R. Co. v. Railroad Co., 113 Ill. 156. In *Re Metropolitan Ry. Co.*, supra, it was objected that the condemnation proceedings could not be maintained by the petitioner because of the lease of its line of road to another company. Concerning the objection the court said: *'This objection is not well founded, because it has been repeatedly decided that the leasing of a line of railway corporation to another corporation does not deprive the former of the power to exercise the right of eminent domain.'* The Illinois case above cited (113 Ill. 156) is an interesting and instructive one, and is directly in point here, especially on the question of the power of a lessor railroad company to condemn private property for corporate purposes. In that case, as in this, the company seeking to appropriate the property did not own any cars or locomotives, and did not transport passengers or freight, and had leased its line to other companies, and yet the court there held that it was not thereby deprived of the right to take property under the power of eminent domain."

Beckman v. Lincoln & N. W. R. Co. (Neb.), 112 N. W. 348. The defendant railroad company had instituted condemnation proceedings in the county court against plaintiff. The county court had granted condemnation and given possession, and that case was appealed to the district court. While there pending on appeal, the plaintiff sued separately in the district court and secured an injunction against further proceedings in the condemnation action and against further construction by the railroad. It appeared that the defendant railroad company was incorporated in 1879 to construct a railroad from Lincoln to Columbus, Nebraska, and thence to the north boundary of the state. It constructed the road from Lincoln to Columbus and the next year leased

its right of way and all of its property and franchises to the Burlington & Missouri River Ry. Co. for a period of 999 years. Thereafter, the Chicago, Burlington & Q. R. R. Co. purchased the road and properties of the Burlington & Missouri River Ry. Co., including the long-term lease of the defendant company. The properties of the defendant company were being operated by the Burlington under the lease at the time of the condemnation proceedings.

On the appeal in the injunction suit the defendant railroad company contended that the plaintiff was not entitled to the relief by injunction but could only seek quo warranto. The supreme court did not agree with that contention, saying the plaintiff could proceed in equity *because it could not question the railroad company's right in the condemnation proceedings*. We quote from the opinion:

“* * * An appeal to the district court does not vacate or supersede the proceedings in the county court so as to prevent the railroad company from proceeding with the construction of its road upon the land, which may be completed and the road in operation before the matter is finally heard in the district court. Any relief that the district court might then afford cannot be said to be adequate. On the other hand, it is equally clear that the corporate existence of the defendant cannot be attacked, nor its right to exist and exercise its corporate franchises challenged, by a private individual in this form of action.”

“The contention of the plaintiff is, in substance, that the defendant is not engaged in the construction of the line which crosses his land, but that the same is being constructed by the Chicago, Burlington & Quincy Railroad Company for its own use and benefit; that the nearest point on defendant's line of

railroad is more than two miles from his premises; and that the condemnation proceedings are not prosecuted in good faith for the proper use of the defendant, and are in fraud of plaintiff's rights. The contention of the plaintiff that 'a railroad company cannot use its powers of eminent domain to acquire a right of way for another company's road' is manifestly right. * * * It clearly has no authority to take land for the use of another company in the construction of the road of the latter. No one would contend that this defendant company could go into a distant county of the state and condemn land for the construction of a road in which it would have no interest when constructed, a road that would be the property of another company and used exclusively by that other company. The Lincoln & Northwestern Railway Company may condemn land necessary for the construction of its road, but it cannot condemn land for the construction of a road by and for the Chicago, Burlington & Quincy Railroad Company, or any other company; and the principal question in this case is whether this land is being taken for the construction of the road of the defendant in this action, or whether it is in fact being taken for the construction of the road of the Chicago, Burlington & Quincy Railroad Company."

The Nebraska Supreme Court held that the road was the road of the defendant being built by it and reversed the trial court and dismissed the injunction. In connection with this case we wish to call the court's attention to the fact, as stated herein, that "a railroad company cannot use its powers of eminent domain to acquire a right of way for another company's road." Therefore, the Union Pacific could not file and maintain an action to acquire a right of way which would become a part of the road owned by the Short

Line. The Union Pacific does not own the railroad properties involved herein and owns only the line of railroad extending east from Ogden, and we are sure that under this case and other similar law neither the Union Pacific nor anyone else “could go into a distant county of the state and condemn land for the construction of a road in which it would have no interest when constructed.” Under the very terms of the lease itself, all “such additions, betterments and extensions made upon or to any part of the demised premises owned by the Lessor shall become and be a part of the demised premises and the property of the Lessor, and the Lessor shall reimburse the Lessee to the extent of the cost incurred by it therefor, chargeable to property investment accounts.” The Short Line owns the railroad and will own the industry spur sought to be added here and is entitled to condemn and the one who should condemn.

Riden v. Philadelphia, Baltimore & Washington R. Co. (Md.), 35 A, 2d 99. The plaintiff sought to restrain and enjoin the defendant from condemning his land for a spur track to the Bowie race track. The defendant had leased all of its road and properties to the Pennsylvania Railroad Company, which was operating them under such lease at the time condemnation was filed. The Pennsylvania Railroad Company did not have authority for eminent domain in the State of Maryland, and plaintiff contended because of the lease and the operation by the Pennsylvania Railroad that the plaintiff no longer had the right to condemn. The Maryland Appellate Court held otherwise. We quote from the court’s opinion:

“It is an accepted doctrine that the power of eminent domain is inalienable, and any agency clothed by the State with this sovereign power should hold it as a public trust to be exercised whenever public necessity and convenience require it. It is accordingly held that any contract which attempts to impair the power of eminent domain is void as being contrary to public policy. *Mobile & Ohio R. Co. v. Union City*, 137 Tenn. 491, 194 S. W. 572; 18 Am. Jur., Eminent Domain, Sec. 25. It appears from the record in this case that the Philadelphia, Baltimore & Washington Railroad Company, incorporated under the laws of Maryland, Pennsylvania and Delaware, leased its railroad lines and property to the Pennsylvania Railroad Company, a Pennsylvania corporation, for the term of 999 years, beginning January 1, 1918. But the lessor expressly reserved its franchise and any other right or privilege which may be necessary to preserve its corporate existence or organization, and receives from the lessee an annual rent sufficient to pay not only interest on bonds and dividends on stock, but also organization, administration and legal expenses. Thus it maintains its corporate identity and is continuing to fulfill its obligations to the State. It is evident that the lessor may find it necessary at any time to resort to the power of eminent domain in order to enlarge or improve the railroad system or to meet exigencies growing out of increased transportation. Under some circumstances it is conceivable that a loss of such power might be destructive of important rights in the operation of the road, and might render the lease almost valueless. In such an event the lessor would be unable to perform its duty to the State. *We therefore conclude that, except in case of fraud, a domestic railroad corporation does not divest itself of the power to condemn private property necessary for corporate purposes by leasing its lines and property to another*

company, although the lessee itself may not have the right as a foreign corporation to exercise the power of eminent domain within this State."

Robertson v. Brooksville & I. Ry. Co. (Fla.), 129 S. 582.

This case involved condemnation proceedings instituted by the Brooksville & Inverness Ry. Corporation. The railroad and all of the railroad properties of the plaintiff had been leased to, and were being operated by, the Seaboard Airline Railway Company. Upon the question of the right of condemnation being raised as a result of this lease, the Supreme Court of Florida disposed of the matter with the following short paragraph:

"It is well settled that a railroad company which has leased all of its property and franchises can exercise the right of eminent domain for the acquisition of property necessary to the operation of the road by its lessee. Elliot on Railroads, Third Edition, Section 1212, and cases cited. And in New York it has been held that this principle is applicable even where the lease is for the period of the entire life of the corporation. Matter of N. Y., etc., R. Co., 99 N. Y. 12, 1 N. E. 27."

Snyder v. Baltimore & O. R. Co. (Pa.), 60 A. 151. The Glenwood Railroad Company, a corporation organized under the general railroad acts of Pennsylvania, leased its road and properties to the Pittsburgh & Connelsville R. R. Co., also a Pennsylvania corporation. The latter then leased its entire road and properties, including the Glenwood lease, to the Baltimore & O. R. Co., a corporation of the State of Maryland.

The Glenwood Railroad Company filed an action in condemnation to secure property for the purpose of widening its road. It was contended that the Glenwood company did not have the right to condemn nor was there any public necessity shown, inasmuch as the Glenwood company owned no cars or motive power and had no need of increasing its facilities. The Supreme Court of Pennsylvania upheld the right of the Glenwood company to prosecute an action in condemnation. Among other things, the Supreme Court said:

“Assuredly its power to so appropriate could not be questioned if done for itself and it certainly does not cease to exist because its exercise might operate to the benefit of its lessees, who could properly request that the power be so exercised by the lessor to meet the exigencies growing out of the increased transportation.”

See, also, *Terre Haute & P. R. Co. v. Robbins* (Ill.), 93 N. E. 398, also a lease case, wherein it was contended that the lessor did not have the right to condemn and wherein, also, an attack was made upon the continued existence of the lessor company, with respect to which the Illinois Supreme Court said:

“In a proceeding for the condemnation of real estate for railroad uses, the question of the *de jure* existence of the company cannot be determined. It is sufficient that the statute authorized the organization of the corporation, and that the petitioner is a corporation *de facto*. Whether or not it has a legal existence as a corporation can only be determined by a direct proceeding—the writ of *quo warranto*.

* * *

“Railroad companies incorporated or organized under the laws of this state have the power to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or renting their roads or any part thereof, and also to contract for and hold in fee simple or otherwise, lands or buildings in this or other states for depot purposes * * *. Railroads may thus be united and merged in a single line or two companies may arrange for the joint use of the same tracks. * * *. The contract between appellant and the Illinois Central R. R. Co. for the use of the latter’s right of way and tracks between Maroa and Decatur Junction executed on November 14, 1894, for the period of 25 years, can be ended by either party on one year’s notice. * * *

“While it retained its franchise, the question of whether or not it was improperly exercising such franchise was one between it and the state. Any question of illegal combination or arrangement entered into by it that might affect the franchise could only be raised by the people in a proceeding instituted for that purpose.”

We feel that that case has direct application to the case at bar because the respondent company is a railroad company incorporated under the laws of this state and was certified by the secretary of state to be in good standing as of the date of the trial. Being such a railroad corporation in good standing, it has, under the state laws, Section 77-0-5, the right to prosecute an action in condemnation to secure a right of way and also the right to lease its property or otherwise contract with other companies for operation of its road, just so long as the contract or lease is not with a railroad owning a competing line. The question as to whether

it is such a corporation, or whether by its acts pursuant to such law it has ceased to be the type of corporation therein authorized, is something that cannot be attacked collaterally in this condemnation action, but the question as to whether it was or was not improperly exercising its franchise is one between it and the state, and upon that basis alone the judgment of the trial court should be affirmed.

See, also, *Pine Martin Mining Co. v. Empire Zinc Co.* (Colo.), 11 P. 2d 221; *Peterson Orchard Co. v. Southwestern Ark. Utilities Corp.* (Ark.), 18 S. W. 2d 1028; *Renter v. Malin Water Co.* (Ind.), 198 N. E. 442.

In the various arguments had in the trial court, commencing with the pretrial, counsel for plaintiff and respondent cited to the court and to opposing counsel and referred to several of the cases herein cited and set forth wherein railroad corporations, which had leased their properties similar to what plaintiff and respondent has done here, were nevertheless held to be entitled to prosecute condemnation actions in their own names. In spite of the fact that this was litigated as a major issue in the trial court and is really the issue here, and in spite of the fact that plaintiff and respondent cited such cases giving appellant's counsel access thereto, appellant has not seen fit to cite any contrary case, and we therefore conclude that he has found none.

CONCLUSION

The statutes and laws of the State of Utah do not give the right of condemnation to a common carrier, and nowhere in those laws is it stated or even inferred that a corporation

(or individual) must show itself to be a common carrier as a prerequisite to entitle it to condemnation. Nevertheless, we think it must be concluded in this case that the Oregon Short Line Railroad Company is a common carrier, with its property being handled by, and its duties as such common carrier being performed by, the Union Pacific Railroad Company as substitute or agent for it pursuant to the lease contract, as so stated by the Supreme Court of the United States in the case of *North Carolina R. R. Co. v. Zachary*, 232 U. S. 248, 58 L. Ed. 591, 34 S. Ct. 305. Also, the Constitution of the State of Utah makes it a common carrier and places duties and responsibilities upon it as such and by virtue of its state charter which it cannot escape by lease, or otherwise, pursuant to constitutional mandate, and which duties and responsibilities are in no manner lessened or relieved by its lease with the Union Pacific Railroad Company.

The Oregon Short Line Railroad Company is a railroad corporation organized under the laws of this state and is such a corporation in good standing under the laws of the State of Utah, and as such is specifically given the power and the authority to condemn, and by the same law and by the same section given the right and authority to lease its properties to a non-competitive railroad company.

The authorities, aside from our Utah statutes and state constitution, are without dissent and are conclusive in holding that a railroad corporation, such as the plaintiff and respondent herein, still retains its right to bring and prosecute actions in eminent domain, in spite of and after having leased its properties to another railroad company for operation, whether such lease is for one year and from year to

year, as with the Short Line lease involved in this case, or whether such lease is for the entire life of the corporation.

The property being condemned by plaintiff and respondent by virtue of the lease will become a part of the property owned by the Short Line and is contiguous to such Short Line properties and therefore could not be condemned for it by any other corporation, and the use proposed and for which the plaintiff and respondent sought the property herein being condemned was and is a public use authorized by law, and the trial court found and concluded that it was a proper public use authorized by law, and the appellant has not attacked said finding nor certified proper parts of the record to this court in any frank attempt to show that the trial court may have erred in such finding or conclusion.

Therefore, the judgment and decree of the trial court, and the whole thereof, should be affirmed.

Respectfully submitted,

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