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Record No. 5288

In the
Supreme Court of Appeals of Virginia
at Richmond

SEABOARD AIR LINE RAILROAD COMPANY
v.
RICHMOND-PETERSBURG TURNPIKE AUTHORITY

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS.

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.
§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

Court opens at 9:30 a. m.; Adjourns at 1:00 p. m.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 5288

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Thursday the 12th day of January, 1961.

SEABOARD AIR LINE RAILROAD COMPANY,
Appellant,

against

RICHMOND-PETERSBURG TURNPIKE AUTHORITY,
Appellee.

From the Law and Equity Court of the City of Richmond

Upon the petition of Seaboard Air Line Railroad Company, a corporation, an appeal is awarded it from a decree entered by the Law and Equity Court of the City of Richmond on the 15th day of July, 1960, in a certain chancery cause then therein depending wherein the said petitioner was plaintiff and Richmond-Petersburg Turnpike Authority, a political subdivision of the Commonwealth of Virginia, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said Law and Equity Court in the penalty of three hundred dollars, with condition as the law directs.

RECORD

* * * * *

Received and filed Nov. 17, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

BILL FOR AN INJUNCTION.

To the Honorable Judges of said Court:

Your complainant, Seaboard Air Line Railroad Company (hereinafter called "Railroad"), brings this its bill for an injunction against the respondent, Richmond-Petersburg Turnpike Authority (hereinafter called "Authority"), and respectfully represents as follows:

1. Railroad is a corporation duly organized and existing under the laws of the Commonwealth of Virginia and engaged as a common carrier of passengers and freight by railroad, both in interstate and intrastate commerce.

2. Authority is a political subdivision of the Commonwealth of Virginia, created and existing pursuant to the provisions of Chapter 705 of the Acts of Assembly of 1954, as amended by Chapter 707 of the Acts of Assembly of 1956.

3. Pursuant to said Acts, Authority constructed and is now operating and maintaining a limited access express
page 2 } highway or turnpike from a point north of the City of Richmond to a point south of the City of Petersburg, through and between both cities.

4. Authority determined to construct said limited access highway or turnpike upon a route which affected property owned by the Railroad at several locations in the City of Richmond and in the Counties of Chesterfield and Dinwiddie, Virginia.

5. Pursuant to the aforesaid Acts and power granted to Authority therein, Authority entered into negotiations with Railroad to acquire from it certain easements and air rights necessary to the construction, operation and maintenance of overhead bridges and viaducts over Railroad's property, which resulted in a written agreement made and entered into as April 19, 1957, whereby Railroad agreed to convey to

Authority the easements and air rights requested, which said agreement contained paragraph 15 thereof as follows:

"15. The Authority shall indemnify and save harmless the Railroad from and on account of any liability, damage, loss or injury occasioned to the Railroad, its employees or property, or persons or property upon the premises of the Railroad, and for which or to whom the Railroad may or shall be held responsible in damages due to, arising out of, or happening in connection with the operation, use, and maintenance of the Bridge Facilities, including drainage thereof and objects of any kind that may fall or be thrown therefrom onto the premises of the Railroad."

By definition in said agreement of April 19, 1957, the term "Bridge Facilities" as used in the above quoted paragraph 15 included Authority's James River Bridge.

page 3 } 6. Pursuant to said agreement Railroad conveyed to Authority by a certain easement deed dated December 19, 1957, "the perpetual easements and air rights necessary and proper for construction, operation, maintenance, repair and renewal of the Grantee's (Authority's) James River Bridge over, across and upon" certain parcels of land in the City of Richmond therein described, among which was the following, being a portion of the property formerly used by Railroad in connection with its passenger operations at Main Street Station:

"Beginning at a point on the east line of Fifteenth Street 58.5 feet north of the intersection of said east line of Fifteenth Street with the north line of Main Street which point is 61 feet left of station 1719 + 18.9 of the construction centerline of the Richmond-Petersburg Turnpike; thence N 37° 48′ E along the east line of Fifteenth Street 234.2 feet to a point 60 feet right of station 1721 + 19.7 of said construction centerline; thence in a southerly direction along the eastern line of the easement for the Richmond-Petersburg Turnpike on a curve to the left having a radius of 1372.4 feet a distance of 243 feet to a point 60 feet right of P. C. station 1718 + 76.695 of said construction centerline; thence S 1° 05′ W along the eastern line of said easement 10 feet to a point 60 feet right of station 1718 + 66.7 of said construction centerline, said point being in the dividing line between the property of the grantor and the property owned jointly by the grantor and the Chesapeake and Ohio Railway Company; thence S 36° 39′ W along said dividing line 44 feet, more or less, to a corner in said dividing line 34.2 feet right of station 1718 +

30.1 of said construction centerline; thence N 53° 15′ W along said dividing line 117.4 feet to a point in the western line of said easement which point is 60.7 feet left of station 1718 + 97.2 of said construction centerline; thence N 1° 05′ E along said easement line 22.6 feet to the point of beginning; containing 0.426 acre and being substantially located as shown on Sheet 6 of the Right of Way Plan, Richmond-Petersburg Turnpike, Contract No. B-2-Sub, approved April 4, 1956, revised June 6, 1957, attached hereto as a part hereof.

page 4 } "Being a portion of the real estate conveyed to Seaboard Air Line Railroad Company by deed from Tazewell Taylor, Special Master, Seaboard Air Line Railway, and others, dated July 1, 1946, recorded in the Clerk's Office of the Chancery Court of the City of Richmond, Virginia, in Deed Book 455-A, page 527."

7. Said easement deed provided that the conveyance thereby made was subject to certain "terms, conditions, restrictions, covenants and agreements," among which were the following:

"1. It is understood and agreed by the parties hereto that the Grantor hereby reserves unrestricted and exclusive use and control of the lands and facilities thereon underneath the said bridge and the airspace above it for the use of same to the fullest extent not detrimental to the use of said bridge for highway purposes. In the event the use of said bridge and any additions thereto for highway purposes should be abandoned, the easements and rights hereby granted to the Grantee shall cease and determine, and revert to the Grantor; and the Grantee shall, at its sole cost and risk, dismantle and remove said bridge, and any additions thereto, and leave the premises in condition satisfactory to the Chief Engineer of Grantor.

"2. The Grantor reserves unto itself the right, subject to the approval of the Chief Engineer of the Grantee, to attach to the under portions of said bridge and to construct, operate and maintain in the airspace above the said bridge such signal devices, electric and communication wire and signal lines as may be requisite or useful in the operation of its railroad and its facilities, including telegraph lines owned by The Western Union Telegraph Company, provided that such attachments shall be made and such lines shall thereafter be maintained by the Grantor in a manner not detrimental to the use of the bridge for highway purposes and at the Grantor's own costs and expense, except as provided otherwise by agreement of the parties hereto. The Grantee agrees

that it will not permit any other person, firm or corporation to affix any facilities to said bridge across the aforementioned easement areas, except with the prior written consent of the Chief Engineer of Grantor.

"3. As part of the consideration herefor, the page 5 } Grantee, its successors and assigns, agrees to be bound by and to perform each and every agreement and covenant of the said agreement dated as of the 19th day of April, 1957, as if the same were fully set forth herein."

8. Pursuant to the terms of the aforesaid agreement and easement deed, Authority has constructed across the hereinabove described property a concrete viaduct forming a part of and connecting with its James River Bridge carrying a limited access express highway or turnpike.

9. Railroad, by a certain agreement dated July 9, 1958, leased to the Department of Agriculture and Immigration, an agency of the State of Virginia, a certain tract of land therein described as:

"All those certain areas of land designated as parking spaces numbered from 11 to 56, inclusive, at Richmond, Virginia, as shown outlined in RED, including the driveway area outlined in GREEN, and with the right to use, in common with others, the area shown in solid BLUE as a driveway, as indicated on copy of Railroad's Chief Engineer's drawing 17292, dated May 1, 1958."

a copy of said drawing being attached to this bill as Exhibit A and made a part hereof. Such area, or a portion thereof, is the same land over which Authority constructed its viaduct for the purposes and subject to the conditions set forth above.

10. By the terms of said lease the lessee covenanted "that the demised premises shall be used solely for the parking of automobiles of its employees," and said premises have been so used ever since. Said lease contains the following provision:

"Lessee assumes all risk of, and releases Railroad from, liability for injury to persons or loss of property growing out of the exercise or attempted exercise of the privilege herein granted, and will indemnify and save harmless Railroad from all liability or loss growing out of claims and page 6 } suits brought by any person on account of personal injuries or damage to property occurring on or about the leased premises occasioned by fire or any other

cause whatsoever; EXCEPTING, HOWEVER, such liability or loss for which The Richmond-Petersburg Turnpike Authority has agreed, under the provisions of paragraphs 14 and 15 of that certain agreement dated April 19, 1957, between Railroad and said Turnpike Authority, to indemnify and save harmless Railroad, its employees or property, or persons or property upon the premises of Railroad, and for which or to whom Railroad may be held responsible in damages due to, or arising out of, or happening in connection with the operation, use and maintenance of the bridge facilities of said Turnpike Authority, including painting and drainage thereof and objects of any kind that may fall or be thrown therefrom onto the demised premises."

11. The viaduct built and constructed by the Authority as aforesaid was constructed in such manner and of such design and materials that the same has attracted large numbers of pigeons which have nested and roosted and continue to nest and roost thereon.

12. The droppings from the large numbers of pigeons roosting and nesting on the Authority's concrete viaduct as aforesaid constitute a nuisance and have a material adverse effect on the continued use of the aforesaid demised premises for parking lot purposes by the Department of Agriculture and Immigration.

13. As a result thereof, portions of the demised premises have been rendered unfit and unusable for normal parking lot purposes. The Department of Agriculture and Immigration has deducted from rental due Railroad during the term of the lease expiring June 30, 1959, the amount of damages to paint on automobiles parked on the demised premises and refused to renew its lease for the year beginning

page 7 } July 1, 1959, except on condition that the rent be reduced on account of the existence of said nuisance, relations between Railroad and said Department of Agriculture and Immigration as landlord and tenant have been jeopardized, and the value of said property has been materially reduced by the continuance of the nuisance so created and maintained by Authority.

14. The use of said viaduct for nesting and roosting by large numbers of pigeons as permitted by Authority constitutes an interference with and obstruction to the right reserved by Railroad under paragraph 2 of the aforesaid easement deed "to attach to the under portions of said bridge * * * such signal devices, electric and communication wire

and signal lines as may be requisite or useful in the operation of its railroad and its facilities, including telegraph lines owned by The Western Union Telegraph Company." As a result thereof the said viaduct has become unfit and unusable by the Railroad for the purposes so reserved. The failure of Authority to abate said nuisance obstructs and prevents proper installation, maintenance and repair of such signal devices, electric and communication wire, signal lines and telegraph lines as may be attached to said bridge by Railroad with consequent danger in the safe operation of the trains of Railroad.

15. Railroad has notified Authority of the foregoing facts and called upon it to abate the nuisance so created and maintained by it, to take action to eliminate the same and to reimburse it for loss so suffered and the damage therefrom to the market value of its property.

page 8 } 16. Despite said demand Authority has denied all responsibility therefor and refused to abate the nuisance maintained by it, to take action to eliminate the same, or to compensate Railroad for its damages.

17. The keeping and maintaining of said nuisance has and will continue to cause great and irreparable injury to Railroad, and due to the nature and character of said injury, the damages arising therefrom would be impossible of ascertainment for which it has no adequate remedy at law.

WHEREFORE, Railroad prays that a mandatory injunction may be granted it against Authority requiring it to abate and discontinue the nuisance maintained and permitted by it aforesaid and that Railroad may recover from Authority losses heretofore sustained and the damage to the fair market value of its property resulting therefrom.

SEABOARD AIR LINE RAILROAD COMPANY
By T. B. HUTCHESON

State of Virginia,
City of Richmond, to-wit:

T. B. Hutcheson, being first duly sworn, deposes and says that he is the Chief Engineer of the Seaboard Air Line Railroad Company, the complainant in the foregoing Bill for an Injunction, that he is familiar with the matters and things set forth therein, that they are true to the best of his knowl-

edge and belief, and that he is duly authorized
page 9 } to execute the same on behalf of the said Seaboard Air Line Railroad Company.

T. B. HUTCHESON.

Subscribed and sworn to before me this 12th day of November, 1959.
My commission expires: August 3, 1962.

W. H. WALLACE, JR.

Seal Notary Public.
EPPA HUNTON, IV
HARRY FRAZIER, III
Counsel for Seaboard Air Line Railroad Company
1003 Electric Building
Richmond 12, Virginia.

* * * * *

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* * * * *

DEMURRER.

The respondent says that the complainant's bill is not sufficient in law for the following reasons:

1. The bill sets forth no grounds for equitable relief against the respondent.
2. Under the facts set forth in the bill, no responsibility rests upon the respondent for condition of which the complainant complains or for the damages allegedly resulting from such condition.

THE RICHMOND-PETERSBURG TURNPIKE AUTHORITY
By WALTER E. ROGERS
Counsel.

WALTER E. ROGERS
WILLIAMS, MULLEN, POLLARD & ROGERS
1001 East Main Street
Richmond 19, Virginia.

I certify that a copy of the foregoing Demurrer was mailed this 8 day of December, 1959 to Eppa Hunton, IV, Counsel for Seaboard Air Line Railroad Company, at his office at 1003 Electric Building, Richmond 12, Virginia.

WALTER E. ROGERS.

Received and filed Dec. 8, 1959.

Teste:

LUTHER LIBBY, JR., Clerk
By EDW. G. KIDD, D. C.

* * * * *

page 19 } March 8, 1960.

* * * * *

Gentlemen:

I find nothing in the agreement between the parties controlling the issue presented by the demurrer to the bill of complaint herein. As for the general law, no authority has been cited in support of the complainant's theory, nor have I been able to find any On the contrary, the law seems to be clearly settled the other way. An order may be presented sustaining the demurrer.

As said by Chief Justice Parker, in *Com.* v. *Thomas Chace,* 19 Pick. (26 Mass.) 15, "(i)t is held in all the authorities that doves are *ferae naturae* * * * except when in the care and custody of the owner * * *" As to ownership in such cases the text in 3 Blackstone's Commentaries, 391, is as follows:

"A qualified property may subsist in animals *ferae naturae, per industriam homini*: by a man's reclaiming and making them tame by art, industry, and education; or by so confining them within his own immediate power, that they cannot escape and use their natural liberty."

It is true that the same learned author, *op cit.,* at p. 392, and there has been considerable criticism of this particular statement, that the qualified property in animals *farae naturae* ceases when they are at large unless they have
page 20 } *"animum revertendi,"* adding this illustration:
"So are my pigeons that are flying a distance from

their home (especially of the carrier kind) * * *." But, I take it, in calling them "my pigeons," and referring to their "home," to which they will return by natural instinct, the author was obviously referring to pigeons reclaimed and made tame *per industriam hominis.*"

In *Bowlston* v. *Hardy,* Cro Eliz. 547, 78 Reprint 794, decided in the 39th Year of Elizabeth I, it was held that an action of nuisance could not be maintained against the owner of a warren from which the rabbits came to eat the plaintiff's corn, the court saying:

"And this is not like to other cases which were put of nusances; for there the tort is by the party himself who doth it; but here the putting the conies into his own land is not any tort, and if there be any wrong it is by the conies themselves, who are *ferae naturae* * * *"

A similar case is that of *Hinsley* v. *Wilkerson,* Cro. Jac. 387, 79 Reprint, 938, decided in the 8th Year of Charles I. wherein it appeared that rabbits came out of the defendant's wood to eat the grass on plaintiff's common. On behalf of the owner of the wood it was argued that "here is no more cause of action than when one suffers his doves to fly into the corn adjoining, for which clearly no action lies * * *" On error from the Common Pleas it was held that this argument was correct, for the reason that at the time of the doing of the damage "none hath any property in them."

Skipping several centuries down to the present time we find the case of *Ebhardt* v. *Safeway Stores* (C. C. A. Va.) 227, F. (2d) 379, where it was held that a complaint charging that Safeway had created a nuisance which attracted rats, which in turn came upon plaintiff's property, did not state a cause of action, since rats are animals *ferae naturae.* In support of this decision the case of *Stern* v. *Prentis Bros., Ltd.,* (1919) 1 K. B. 394, is cited. In that case Bray, J., said that to his knowledge the *Bowlston's Case, supra,* had never been "overruled or questioned."

page 21 } Counsel might also be interested in reading the case of *Sickman* v. *United States,* 184 F. (2d) 616, cert. den. 341 U. S. 939, in which it was said, in part, as follows: (184 F. (2d) at p. 618):

"* * * a private person could not be held liable for the trespasses of animals *ferae naturae,* and which have not been reduced to possession, but which exist in a state of nature."

Compare also Section 183 and 184 of Title Animals, 3 C. J. S. 1290.

Here it is not alleged that the Turnpike Authority, by its industry, reclaimed the pigeons. It is no more at fault because the pigeons happen to like roosting on its bridge than was the owner of the wood in *Hinsley* v. *Wilkerson, supra.*

Yours very truly,

RLY/e

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* * * * *

DECREE.

This cause came on to be heard on the 29th day of February, 1960, upon the complainant's bill and the demurrer of the respondent, The Richmond-Petersburg Turnpike Authority, to the said bill of complaint, duly filed, and was argued by counsel.

Upon consideration of which the Court, not being advised of its decision upon the matters raised by the demurrer, took the same under advisement. And the Court having considered the said bill of complaint, the exhibit filed therewith, and the demurrer of the said respondent and now being advised of its decision, doth adjudge, order, and decree that the said demurrer be, and it is hereby, sustained for the reasons set forth in the letter opinion dated March 8, 1960, rendered herein, which is hereby made a part of the record in this cause.

And the complainant having declined leave to amend the bill of complaint, it is further adjudged, ordered, and decreed that the said bill of complaint be, and it is hereby, dismissed, and this cause is dismissed from the docket, to which ruling and action of the Court in sustaining the demurrer and dismissing said bill and dismissing this cause from the docket the complainant duly excepted.

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I ask for this:

WALTER E. ROGERS
Counsel for the Respondent.

I object to this:

EPPA HUNTON, IV.
Counsel for the Complainant.

Enter July 15, 1960.

R. L. Y.

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENTS OF ERROR.

To: Mr. Luther Libby, Jr., Clerk Law and Equity Court of the City of Richmond, City Hall, Richmond, Virginia:

Seaboard Air Line Railroad Company, by counsel, hereby gives notice, pursuant to the provisions of Rule 5:1, Section 4, Rules of the Supreme Court of Appeals of Virginia, of its intention to appeal from a final decree entered herein on July 15, 1960, whereby the court sustained the demurrer of The Richmond-Petersburg Turnpike Authority and dismissed the bill of complaint.

Seaboard Air Line Railroad Company hereby assigns the following errors:

(1) The court erred in sustaining the demurrer of Richmond-Petersburg Turnpike Authority and dismissing the bill for an injunction.

(2) The court erred in holding that agreements between Seaboard Air Line Railroad Company and The Richmond-Petersburg Turnpike Authority, and especially paragraph 15 of an agreement dated April 19, 1957, do not impose liability upon The Richmond-Petersburg Turnpike Authority for damage to Seaboard Air Line Railroad Company re-
page 25 } sulting from pigeons nesting and roosting on the James River Bridge of The Richmond-Petersburg Turnpike Authority.

SEABOARD AIR LINE RAILROAD COMPANY
By EPPA HUNTON, IV
HARRY FRAZIER, III
Counsel.

EPPA HUNTON, IV
HARRY FRAZIER, III
HUNTON, WILLIAMS, GAY,
POWELL & GIBSON
1003 Electric Building
Richmond 12, Virginia
Of Counsel.

CERTIFICATE.

I certify that a copy of the foregoing Notice of Appeal and Assignments of Error was mailed to Walter E. Rogers, 1001 East Main Street, Richmond 19, Virginia, counsel of record for the respondent, on September 6, 1960.

EPPA HUNTON, IV
Counsel.

Filed Sep. 7, 1960.

Teste:

LUTHER LIBBY, JR., Clerk.

* * * * *

A Copy—Teste:

H. G. TURNER, Clerk.

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