N.C.P.I.—Civil 840.30
CARTWAY PROCEEDING.
GENERAL CIVIL VOLUME
REPLACEMENT JUNE 2015
N.C. Gen. Stat. § 136-69

840.30 CARTWAY PROCEEDING. N.C. Gen. Stat. § 136-69.[1]

This issue reads:

"Is the petitioner entitled to the establishment of a means of entry to and exit from *his* land over the land of the respondent?"

On this issue the burden of proof is on the petitioner. This means that the petitioner must prove, by the greater weight of the evidence, three things:

First, that there is no public road[2] or other adequate means of transportation affording necessary and proper entry to and exit from the petitioner's land. (A private right-of-way or permission to use the land of another person for entry and exit constitutes an adequate means of entry and exit,[3] unless the physical condition of such right-of-way is such that it is not practicable[4] to use that route for entry or exit. In determining what is practicable you may consider the physical nature and condition of the property and the petitioner's use (or proposed use).)

Second, that the petitioner is engaged in (or is preparing to engage in) one or more of the activities for which the law provides a right to claim a means of entry to and exit from *his* land. These activities include [cultivation of land] [cutting or removal of standing timber][5] [working a mine or quarry] [operating an industrial or manufacturing plant] [operating a cemetery]. The petitioner is not required to prove that *his* land will be used only for (*here state the one or more permissible activities claimed by the petitioner*) and for no other purpose. It is sufficient that (*here state the petitioner's claimed use*) is one of the uses to which *his* land is (or will be) put.[6]

[*Use the following sentence if the petitioner's claimed use of the land is "cultivation":* In this case the petitioner claims to be [engaged in cultivation]

[preparing for cultivation] of *his* land. To be engaged in cultivation means to use the land for raising crops or livestock for either commercial purposes or personal use.][7]

[*Use the following paragraph if the petitioner's claim is that* he *is "taking action preparatory to" one of the statutorily prescribed activities:* To be preparing for (*state the petitioner's proposed activity*) means that the petitioner is ready to begin (*state the petitioner's proposed activity*) once *he* has a means of entry to and exit from *his* land. The petitioner need not have taken action on the land itself to prove that *he* is preparing to begin (*state the petitioner's proposed activity*). Other activities by the petitioner relating to the proposed use of the land would constitute some evidence that the petitioner is preparing for (*state the petitioner's proposed activity*).][8]

Third, that the granting of a means of entry to and exit from the petitioner's land over the respondent's land is necessary, reasonable and just.[9]

Finally, as to the (*state number*) issue on which the petitioner has the burden of proof, if you find by the greater weight of the evidence that there is no public road or other adequate means of transportation affording necessary and proper entry to and exit from the petitioner's land, that the petitioner is engaged in (or is preparing to engage in) one or more of the activities for which the law provides a right to claim a means of entry to and exit from *his* land, and that the granting of a means of entry to and exit from the petitioner's land over the respondent's land is necessary, reasonable and just, then it would be your duty to answer this issue "Yes" in favor of the petitioner.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the respondent.

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1 Though commonly referred to as a "cartway" proceeding, this statute authorizes the establishment of a quasi-public route of access and is in the nature of eminent domain. *Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964); *Cook v. Vickers*, 141 N.C. 101, 53 S.E. 740 (1906). The access route may be used for several types of conduit, including cartway, tramway, railway, cableway, chutes and flumes. *See* N.C. Gen. Stat. § 136-69.

2 Other than a navigable waterway. N.C. Gen. Stat. § 136-69.

3 *Taylor* held that an "adequate" means of access could be found where the defendant had offered petitioner a permissible right of way across respondent's land. 262 N.C. at 457, 137 S.E.2d at 836. *Taylor v. Askew*, 17 N.C. App. 620, 195 S.E.2d 316 (1973) held that there was an "adequate" means where the evidence showed that petitioner could acquire a permissive right of way across an easement owned by the county drainage district. *Id*. at 624, 195 S.E.2d at 319.

4 The word "practicable" was approved in *Mayo v. Thigpen*, 107 N.C. 63, 11 S.E. 1052 (1890). In that case petitioner might have had access to a public road across a strip of his land subject to regular flooding that connected two parcels of his own land, one of which abutted on a public road. The court held that a jury could consider the connecting strip not to be a practicable means of access. *Id*. at 65-66, 11 S.E. at 1052. *See also Candler v. Sluder*, 259 N.C. 62, 69, 130 S.E.2d 1, 6 (1963).

5 The term "standing timber" as used in the cartway statute encompasses all growing trees, including trees suitable only for firewood. *Turlington v. McLeod*, 323 N.C. 591, 597, 374 S.E.2d 394, 399 (1988).

6 *Candler* held that petitioner would be entitled to a cartway even if one of the principal uses of his land was not a use prescribed in N.C. Gen. Stat. § 136-69: "The rule of strict construction does not limit the uses to those specified in the statute if in fact that there are uses which do meet statutory requirements." 259 N.C. at 65, 130 S.E.2d at 4.

7 *Candler* held that an apple orchard of forty trees was "cultivation" despite the fact that the apples weren't sold commercially and also held that grazing cattle was an act of cultivation. 259 N.C. at 65-66, 130 S.E.2d at 4.

8 In *Candler* the court said: "To make preparations to cut timber, under the situation here presented, it is not necessary that petitioner take his implements to a gate he is forbidden to enter and wait there until he has established his right to enter by court action. Petitioner testified he was ready to cut the timber as soon as he has a way over which to transport it." 259 N.C. at 66, 130 S.E.2d at 4.

9 *Candler* interprets the criteria "adequate means of transportation affording necessary and proper means of ingress and egress" and "necessary, reasonable, and just" as meaning, for all practical purposes, the same thing. The only material difference between the two, notes the Court, is that the former is stated in the negative and the latter is stated in the positive. 259 N.C. at 68-69, 130 S.E.2d at 6. Thus, the issue arises as to whether both criteria should be used in this instruction. The Committee has decided to adopt both. Its rationale is as follows: First, the statute appears to embrace these phrases as separate standards. Second, *Candler* does not suggest that an instruction based on both criteria would be erroneous. Third, there are a number of circumstances where facts not germane to the "necessary and proper means of ingress and egress" criterion may be probative of the

"necessary, reasonable and just" criterion (*e.g.*, where the proposed route of the cartway would desecrate burial grounds, damage a historic landmark or create environmental issues. There may also be estoppel issues between the petitioner and defendant). In any event, two subsequent cases decided by the Court of Appeals embrace this approach. *See Turlington v. McLeod*, 79 N.C. App. 299, 339 S.E.2d 44, *disc. rev*. *denied*, 316 N.C. 557, 344 S.E.2d 18 (1986) and *Campbell v. Conner*, 77 N.C. App. 627, 335 S.E.2d 788 (1986). *See also Taylor v. West Virginia Pulp & Paper Co.*, 262 N.C. 452, 137 S.E.2d 833 (1964).