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Railroad Rights Of Way — Types Of Interests Acquired

Maryland and Pennsylvania Railroad Co. v. Mercantile-Safe Deposit and Trust Co.¹

The plaintiff brought ejectment for recovery of land used by the defendant as a railroad right of way. The strip of land in controversy ran through land owned by the plaintiff, and had been continuously used by the defendant and its predecessors in title for railroad purposes from 1880 to 1958, at which time the defendant ceased all railroad operations over the land and removed the rails and ties therefrom. The defendant railroad had no documentary evidence of title, but contended that it had acquired title in fee simple absolute by adverse possession. The plaintiff proved a good paper title to the land and contended that the defendant railroad had acquired at most an easement by prescription in the right of way which it abandoned by ceasing operations and removing its ties and rails from the land. The Court of Appeals, affirming the judgment of the lower court, held that the defendant had acquired only an easement by prescription, which it lost by abandonment.

The effect of a railroad's acts of abandonment depend on the nature of the estate held by the railroad. If the interest of the railroad is construed to be an easement, an incorporeal interest, the railroad has only a right to the use of the land and has no corporeal ownership in the land itself.² An easement can be extinguished by abandonment

¹ 224 Md. 34, 166 A. 2d 247 (1960).
² Richfield Oil Corp. v. Railroad Co., 179 Md. 560, 20 A. 2d 581 (1941) — an easement acquired by grant in a right of way held not to give a railroad the right to prevent servient landowner from laying pipes below the surface. See also Pennsylvania R. Co. v. Breckenridge, 60 N.J.L. 382, 33 A. 749 (1897). In Michigan Central R. Co. v. Garfield Petroleum Corp., 292 Mich. 373, 290 N.W. 833 (1940) an easement acquired by prescription in a railroad right of way held not to carry with it any title to minerals under the surface of the right of way. Consumers' Gas Trust Co. v. American
of the railroad line, and the adjoining servient landowner is revested with an unencumbered fee. However, if the interest of the railroad is construed to be a fee simple absolute or qualified, a corporeal estate, this possessory interest does not normally go to the adjoining landowner on relinquishment of the railroad line, but instead remains

Plate Glass Co., 162 Ind. 393, 68 N.E. 1020 (1903) a prescriptive easement acquired in a railroad right of way does not encompass the right to sink a gas well on the right of way. 


In a technical sense there can be no abandonment of a corporal estate. It can be lost only by adverse possession or transfer to another. 2 AMERICAN LAW OF PROPERTY (1952) § 8.08. The “abandonment,” which occurs when the estate in the right of way is a determinable fee simple, is an automatic termination of the estate upon the happening of the stated contingency, i.e., cessation of use for railroad purposes. RESTATEMENT, PROPERTY (1936) § 44. The “abandonment” which occurs in a fee simple subject to a condition subsequent is a breach of the stated condition, i.e., cessation of use for railroad purposes, which does not automatically terminate the estate, but only makes the estate in the land subject to forfeiture if the holder of the power of termination chooses to exercise his right of re-entry. RESTATEMENT, PROPERTY (1936) § 45. See also Lynch v. Bunting, 42 Del. 171, 29 A. 2d 155 (1942).
in the railroad or reverts to the original grantor or his heirs. In determining the nature of the estate held in land used as a right of way, one must look to the method of acquisition by the railroad.

That a railroad corporation may acquire land by acts of adverse possession or prescription is generally recognized. Courts, which have considered the question of the exact nature of the estate taken by a railroad’s adverse occupancy of a right of way, have consistently held, as the Maryland Court of Appeals ruled in the instant case, that the railroad acquires only an easement by prescription, at least in the absence of claim by the railroad under color of title. The principle reason advanced in support of the view that only an easement by prescription is acquired is stated by the California Supreme Court:

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6 Where a deed is construed to convey a fee simple absolute, grantors' heirs at law are not entitled to parcel of land upon abandonment of railroad running across such parcel of land. McCotter v. Barnes, 247 N.C. 450, 101 S.E. 2d 330 (1958). Where by condemnation fee was acquired, and thereafter land was abandoned for purposes for which it was acquired, title did not revert to prior landowners. Jackson v. City of Abilene, 251 S.W. 2d 767 (Tex. 1955). A railroad company acquiring title to realty by warranty deed not limiting the use to be made of the realty, and not providing for a reversion, took a fee simple title, and realty did not revert to original grantors or their heirs when the railroad abandoned the use of realty for railway purposes. Nott v. Beightel, 155 Kan. 94, 122 P. 2d 747 (1942). See also 3 Nichols, op. cit. supra, n. 4, § 9.36[4].

7 When a determinable fee in the right of way is terminated the land reverts to the holder of the possibility of reverter. If the possibility of reverter is nonassignable within the respective jurisdiction, the right of way reverts to the person from whom the land was acquired, or his heirs, whether or not he then owns the adjoining lands. However, if the possibility of reverter is assignable within the respective jurisdiction, it may have been acquired by a subsequent grantee by express or implied grant along with a grant of the lands abutting the right of way. If such occurs, upon termination of the determinable estate in the right of way, the estate will revert to the owner of adjoining lands. For discussion that some courts have failed to observe these distinctions, see A.L.R., supra, n. 4. 3 Nichols, op. cit. supra, n. 4, § 9.36[2]; Reno, Alienability and Transmissibility of Future Interests in Maryland, 2 Md. L. Rev. 89 (1937).


"If there is no color of title, and only use and possession of the property, the right acquired depends on the extent and character of the use and possession. If the sole use is as a right of way, whether as a footpath, wagon road, or railroad, the user will ripen into an easement, and it is only where there is some additional type of user or other action which will give notice that the claim is to more than a right of way that the use and permission may ripen into a fee title.

In the few cases holding that title in fee simple to the right of way was acquired by adverse possession, it appears that the railroad claimed under color of title. Thus in *Atchison, T. and S. F. Ry. Co. v. Stamp*, defendant railroad's predecessors in title entered on the land in controversy under a void deed purporting to convey a fee simple estate and constructed a series of railroad tracks. The Supreme Court of Illinois held that the defendant, having occupied the land under color of title, had acquired a fee simple interest by adverse possession.

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11 Defendant railroad in the California case contended that the conveyance of his predecessor in title, which transferred all "right, title and interest" in the railroad and its properties, was sufficient color of title. But, the court indicated that the conveyance transferred only what the grantor actually had, an easement.

12 "The statement occasionally made that possession under a claim to a mere easement does not, although continued for the statutory period, confer title to the fee, involves the misconception that one merely exercising, or undertaking to exercise, an easement in the land, has possession, or may have possession, of the land. He does not acquire title to the land by adverse possession for the reason that he never had possession, adverse or nonadverse." 4 TIFFANY, REAL PROPERTY (3d ed. 1939) § 1150; cited in *Ma. & Pa. R.R. Co. v. Mer.-Safe, Etc., Co.*, 224 Md. 34, 38-39, 166 A. 2d 247 (1960).

13 *People v. Ocean Shore R.R.*, *supra*, n. 10, 577. Similarly, the Maryland Court of Appeals stated in the instant case that: "[T]he character and extent of the permissible use of an easement acquired by prescription is commensurate with and determined by the character and extent of the use during the prescriptive period." *Ma. & Pa. R.R. Co. v. Mer.-Safe, Etc., Co.*, *supra*, n. 12, 38. See also *Consumers' Gas Trust Co. v. American Plate Glass Co.*, 162 Ind. 393, 68 N.E. 1020 (1903); *Galveston, H. & S. A. Ry. Co. v. McIver*, 245 S.W. 463 (Tex. 1922).

14 290 Ill. 428, 125 N.E. 381 (1919).

15 In *Sadler v. Alabama Great Southern R. Co.*, 204 Ala. 155, 85 So. 350, 381 (1920), a case involving title to a right of way, it was stated that the defendant railroad could "acquire title to land by adverse possession, just as an individual may * * * [D]efendant showed an actual possession under fence of the right of way for more than [the statutory period of limitations] . . . under claim of right and color of title by grant and location." Apparently a fencing in of the tract by the railroad, in and of itself, adds nothing in support to a claim of the fee. *Galveston, H. and S. A. Ry. Co. v. McIver*, 245 S.W. 463 (Tex. 1922), held that the railroad had acquired an easement only, "the mere fencing of its right of way not adding anything to the character of its use and occupancy . . . ."
When the railroad acquires its estate by private grant, the question of what interest is taken is determined by reference to the deed of conveyance. The problem is primarily one of construction and interpretation of the instrument of conveyance to determine the intent of the parties as to whether a possessor's estate or only an easement was conveyed. If a deed to a railroad contains nothing more than a grant of a strip, piece, parcel, or tract of land, adequately and clearly described, there appears to be general agreement that a fee simple estate is conveyed. It is also generally held that where a deed contains nothing more than a grant of a right, or grant of a privilege of constructing, operating, and maintaining a railroad, or grant of a right of way, an easement is conveyed. Thus, the Maryland Court of Appeals has held that an easement was conveyed by a deed worded: "grant, unto [the railroad], its successors and assigns, the rights of way for railroad purposes in and to the [described tracts of land]."

If a deed is not confined in terms either to a grant of land or right, but also contains other ambiguous pro-

Generally railroad rights of way are under fence. That it is rarely mentioned in the cases indicates that it is regarded as of little importance in determination of the issue.

1 Tiffany, Real Property (3d ed. 1939) § 977; 3 American Law of Property (1952) § 12.50.

2 The general rule of construction has been stated as follows:

"The test by which the doubt in a given case is to be resolved is the extent of the privilege of use granted and the clearness with which the space within which those privileges are to be exercised as defined. Limitations on the privileges granted and lack of clearness in describing the space in which they are to be exercised lead in the direction of the finding of an easement. Completeness in the uses granted and clarity and fullness of description lead toward the finding of the conveyance of a possessory interest."

3 American Law of Property (1952) § 8.21.

A deed to a railroad company which "granted, bargained, sold, conveyed and confirmed" to the railroad "all that certain lot, piece or parcel of land... bounded and particularly described as follows," conveyed a fee title. Moakley v. Blog, 90 Cal. App. 96, 265 P. 548 (1928). See also, Alabama & Vicksburg Railway Company v. Mashburn, 235 Miss. 346, 109 So. 2d 533 (1959); Mississippi Cent. R. Co. v. Ratcliff, 214 Miss. 674, 59 So. 2d 311 (1952); Nystrom v. State, ... S.D. ....., 104 N.W. 2d 711 (1960); 132 A.L.R. 142 (1939).

A deed providing that grantors "do give, grant, bargain, sell and convey to the said company the right of way for the use of the said railway over and across the east half of the northwest quarter" held to convey an easement. Ingalls v. Byers, 94 Ind. 134 (1883). See also Daugherty v. Helena & Northwestern Ry., 221 Ark. 101, 252 S.W. 2d 546 (1952); Atkinson v. Westfall, 261 Ia. 822, 69 N.W. 2d 522 (1955); Hinman v. Barnes, 146 Ohio St. 497, 66 N.E. 2d 911 (1946); Lillard v. Southern Railway Company, 330 S.W. 2d 335 (Tenn. 1959); Boles v. Red, 227 S.W. 2d 310 (Tex. 1950); Swan v. O'Leary, 37 Wash. 2d 533, 225 P. 2d 199 (1950).

visions, there is considerable conflict among the courts as to whether such a deed conveys an estate in fee or an easement.\textsuperscript{21} If any general conclusion can be drawn, there appears to be a tendency among the courts to construe an ambiguously worded deed as conveying an easement. Undoubtedly the long-established policy of most courts to oppose the separation of small strips of land in fee, plus the fact that the grants are often made under threat of a compulsory taking and on a form deed drafted by the railroad, influence the courts’ decisions to cut down the nature of the estate conveyed.\textsuperscript{22} The Court of Appeals has construed an ambiguously worded deed of a railroad right of way as conveying only an easement. In \textit{Hodges v. Owings}, the plaintiff brought an action of ejectment, contending abandonment of an easement for a railroad right of way. The language of the deed was not confined to the conveyance of a specific strip of land adequately described by metes and bounds, nor did it clearly convey a right.\textsuperscript{24} To ascertain the deed’s true meaning, the Court stated that it was proper to inquire into “the situation of the parties and the circumstances attending the execution of the deed.”\textsuperscript{25} Accordingly, where it appeared that the grantor of the deed in question was anxious to have the railroad built, that the deed was given for only a nominal

\textsuperscript{21} The term right of way has two distinct meanings. In legal terms it means easement, but in railroad parlance and lay speech it means the strip of land upon which the track is laid. Quinn v. Pere Marguette Ry. Co., 256 Mich. 143, 239 N.W. 376, 379 (1931). The problem in many instances is whether to interpret “right of way” for railroad purposes, or words of similar import as mere words of description, or as words limiting the grant to an easement.

\textsuperscript{22} For extended discussion, see Comment, \textit{Railroads — Extent of Title Acquired by Railroad by Adverse Possession of Land Used as Right of Way — Effect of Mineral Rights}, 39 Mich. L. Rev. 297 (1940); Comment, \textit{The Real Property Interest Created in a Railroad Upon Acquisition of its “Right of Way,”} 27 Rocky Mt. L. Rev. 73 (1954).

\textsuperscript{23} 178 Md. 300, 13 A. 2d 338 (1940).

\textsuperscript{24} \textit{Id.}, 301. The deed provided that, “in consideration that the [railroad company] . . . do locate its Railroad through, in and upon lands owned by [plaintiff] . . . and in further consideration of . . . one dollar . . . [plaintiff] . . . doth hereby grant and covenant and agree to convey to the said [railroad company] . . . its agents, attorneys, or assigns, a strip of land sixty-six feet in width, . . . on each side of the center line of said railroad as the same shall be finally located . . . together with the right to divert streams of water for railroad purposes, and to take and use any stone or timber or other material within the limits of said strip of land . . . .”

\textsuperscript{25} \textit{Supra}, n. 23, 304. Although it was acknowledged that if the language of a deed be doubtful it was to be construed most strongly against the grantor, the court indicated that this rule of construction was to be resorted to only where all other rules fail to reach the intent of the parties with reasonable certainty.
and that a stipulation in the deed permitted the railroad to divert water and to use building materials found upon the strip of land conveyed, which would have been unnecessary if the parties had intended to convey a fee, the Court concluded that the conveyance was of an easement for railroad purposes only.

When the right of way is taken under the power of eminent domain, the nature of the estate appropriated depends on the statute conferring the power, or on the powers granted under the corporate charter. The policy of the courts is to strictly construe the grant of the power of eminent domain because it is in derogation of private rights. The policy of strict construction is implemented by the general rule that only such an estate in the property sought to be acquired by eminent domain may be taken as is reasonably necessary to carry out the function of the condemner. If the statute or charter expressly and positively defines the estate to be taken, no other estate than that prescribed can be seized. It seems that it is not necessary for the statute or charter to expressly state that a fee simple is to be taken, if, by necessary implication, the intent be clear that a fee simple estate is to pass on condemnation; but, it is usually held that a

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28 Other courts have given some weight to the amount of consideration paid. If the consideration is nominal, in an otherwise ambiguous deed, it has some significance in indicating that an easement was conveyed. New York, B. & E. Ry. Co. v. Motill, 81 Conn. 466, 71 A. 563 (1908); Rogers v. Pitchford, 181 Ga. 545, 184 S.E. 623 (1936); Johnson v. Valdosta, M. & W. R. Co., 169 Ga. 559, 150 S.E. 845 (1929); In re Battelle, 211 Mass. 442, 97 N.E. 1004 (1912).

29 Supra, n. 23, 304-5.

30 The proceeding in eminent domain, which involves the element of compulsion is in marked contrast to the effect of a voluntary conveyance between individuals. In the later case, whenever it becomes necessary to construe the instrument of conveyance for the purpose of determining the extent thereof the rule is that the grantee will be allowed the greatest interest possible. In eminent domain, however, that construction must be adopted in the event of uncertainty, indefiniteness or ambiguity as leaves the owner with the greatest possible estate.

Although the analogy to individuals is undoubtedly correct, its applicability in situations involving railroad grantees is doubtful in view of the policy of many of the courts to construe an ambiguous deed as conveying only an easement to the grantee railroad.

31 Cases are collected in 2 Nichols, Eminent Domain (3d ed. 1950) § 9.2, pp. 164-165:

"[T]he proceeding in eminent domain, which involves the element of compulsion is in marked contrast to the effect of a voluntary conveyance between individuals. In the later case, whenever it becomes necessary to construe the instrument of conveyance for the purpose of determining the extent thereof the rule is that the grantee will be allowed the greatest interest possible. In eminent domain, however, that construction must be adopted in the event of uncertainty, indefiniteness or ambiguity as leaves the owner with the greatest possible estate."
railroad taking land under a statute or charter which does not clearly authorize it to take a fee, acquires only an easement. However, in Pennsylvania it is held that a railroad acquires by condemnation a "base fee," which is defined as something more than an easement, but less than a fee simple, and which appears to have all the characteristics of a fee simple determinable estate, but only in the surface of the land and so much beneath as is necessary for support. If the charter or statute is permissive in character, conferring discretion on the company or court as to whether a fee simple estate or lesser interest is to be taken, then the nature of the interest taken will depend on the terms of the judgment in the condemnation proceedings.

In State Roads Comm. v. Johnson, a railroad company, defendant's predecessor in title, had acquired land by condemnation under power of eminent domain. The plaintiff contended that an easement had been acquired by the condemnation, and that it was subsequently lost by abandonment. Since the power to condemn, granted under the railroad's charter, was permissive in character and not confined to the taking of an easement, the issue depended upon the extent of the interest acquired in the condemnation proceeding. The award of the jury condemned "so much of the land represented as belonging to the said [owner] as . . . an absolute estate in perpetuity as is contained within the lines of the annexed plat."

Under a statute authorizing a railroad to "purchase or otherwise take any land," it was held that only an easement for a railroad right of way was acquired: Agostini v. North Adams Gaslight Co., 265 Mass. 70, 163 N.E. 745 (1928); Henry v. Columbus Depot Co., 135 Ohio St. 311, 20 N.E. 2d 921 (1939). See also 155 A.L.R. 381 (1941).


Reed v. Allegheny County, 330 Pa. 300, 199 A. 187, 189 (1938). In Brookbank v. Benedum-Trees Oil Company, 389 Pa. 151, 131 A. 2d 108 (1957), a deed which "granted, bargained, sold, released and conveyed unto the [railroad] a strip of land four rods in width, . . ." was held to pass a "base fee," a defeasible fee with right of surface use only and no mineral rights. Since the deed was construed as having been executed pursuant to condemnation proceedings it was subject to interpretation only in this light. See also Lithgow v. Pearson, 25 Colo. App. 70, 135 P. 759 (1913); 155 A.L.R. 381, 397 (1941); 3 Nichols, EMINENT DOMAIN (5d ed. 1950) § 9.2[13], n. 36.


Id., 497.
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were held to have given the railroad an absolute fee simple title to the land. Although a condemnation for the purpose of a railroad raises a presumption that the grant is limited to that use, the Maryland Court of Appeals stated that:

"[A]ny presumption arising from the general purpose of the acquisition is overcome by the facts that there was no limitation imposed by the Charter [of the railroad], the condemnation award did not contain the language sometimes found in the cases, 'for railroad purposes only', and the land taken was described by metes and bounds and not as a right of way. * * * The reference to the quantity and duration of the interest taken 'as of an absolute estate in perpetuity' effectually negatives an intention to limit the taking to an easement." 40

In each of the three methods of acquisition discussed, certain elements must be present before a railroad can acquire right-of-way land in fee simple absolute, namely:

1. Adverse possession must be under color of title.
2. Deeds must be confined to grants of land.
3. Authorizations to acquire a fee simple estate by eminent domain must be clear, either expressly so or by necessary implication; and if the authorization is permissive, condemnation awards must be confined to awards of land.

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39 Supra, n. 37, 498, "While . . . the words 'in perpetuity,' standing alone, might not be controlling, since they may be used to describe the duration of a lesser estate, . . . we think the phrase 'absolute estate in perpetuity' is synonymous with 'fee simple absolute'."
40 Supra, n. 37, 502.