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RAILROADS — EXTENT OF TITLE ACQUIRED BY RAILROAD BY ADVERSE POSSESSION OF LAND USED AS RIGHT-OF-WAY — EFFECT ON MINERAL RIGHTS — In a recent Michigan case[1] it appeared that for more than the statutory period of limitation the plaintiff railroad had maintained a right-of-way over land to which the defendant held the record title. A decree quieting title in fee simple absolute in the plaintiff railroad was sought in order to determine the ownership of the

[1] Michigan Central R. R. v. Garfield Petroleum Corp., 292 Mich. 373, 290 N. W. 833 (1940).

oil and gas underlying the right-of-way. The court held that the railroad acquired by adverse user of the right-of-way no title to the oil and gas or other minerals beneath the surface of the land.

While it is generally true that a railroad corporation may acquire an interest in land by adverse possession[2] as well as by grant or condemnation under a power of eminent domain, the extent of the interest acquired will often vary according to the manner and the purpose of the acquisition. Likewise, the use by the railroad of any particular piece of land will be limited by certain rules stemming from the peculiar and public nature of the railroad corporation. Usually, if the land was acquired for right-of-way purposes, it can be used by the railroad only for railroad purposes although the corporation may in some cases have taken a fee simple title to the tract.[3] Even those courts which refuse so to limit the use of right-of-way lands held in fee simple limit the use of the right-of-way lands to uses which do not impair the operation of the railroad nor endanger its public purposes.[4] These rules will, it is supposed, apply regardless of the manner of taking or the interest acquired in the right-of-way, since they are based upon the peculiar nature of the railroad corporation rather than the interest which that corporation has in the land. Probably, too, only the second limitation is

[2] 1 ELLIOTT, RAILROADS, 3d ed., § 462, 2 id., § 1174 (1921); Felton v. Wedthoff, 185 Mich. 72, 151 N. W. 727 (1915); Munroe v. Pere Marquette R. R., 226 Mich. 158, 197 N. W. 566 (1924); American Bank-Note Co. v. New York Elevated Ry., 129 N. Y. 252, 29 N. E. 302 (1891); Gulf C. & S. F. Ry. v. Brandenburg, (Tex. Civ. App. 1914) 167 S. W. 170. However, in North Carolina and Pennsylvania the fact that the railroad may enter under its power of eminent domain has led to the conclusion that it cannot acquire title by adverse possession. Narron v. Wilmington & W. R. R., 122 N. C. 856, 29 S. E. 356 (1898); Connellsville Gas Coal Co. v. Baltimore & O. R. R., 216 Pa. 309, 65 A. 669 (1907).

[3] The state can of course inquire by quo warranto into the railroad corporation's power to act. See Attorney General v. Pere Marquette R. R., 263 Mich. 431, 248 N. W. 860 (1933) (railroad held not to be acting ultra vires in leasing right-of-way land held in fee to preserve property from drainage of oil and gas), and Kynerd v. Hulen, (C. C. A. 5th, 1925) 5 F. (2d) 160. There is, however, an intimation running through the cases that the restriction is imposed directly upon the land regardless of the manner of taking or the interest acquired. So, New York, C. & H. R. R. R. v. Aldridge, 135 N. Y. 83, 32 N. E. 50 (1892) (land held in fee), and Norton v. London & N. W. Ry., L. R. 9 Ch. Div. 623 (1878), affd. L. R. 13 Ch. Div. 268 (1879) (land held in fee). In many cases where the restriction on use is stated it is, nevertheless, true that only an easement was involved. E.g., Elyton Land Co. v. South & North Alabama R. R., 95 Ala. 631, 10 So. 270 (1891). See note 94 A. L. R. 522 at 524 (1935).

[4] Certainly this is so if the state complains by quo warranto and probably even if the question is raised in any manner. See cases cited supra, note 2, and Attorney General v. Pere Marquette R. R., 263 Mich. 431, 248 N. W. 860 (1933) (quo warranto); Northern Pac. Ry. v. North American Telegraph Co., (C. C. A. 8th, 1915) 230 F. 347 at 349.

applicable to land not used for right-of-way purposes, and there the only considerations in determining the permissible use will be the interest which the railroad has acquired in the land and the extent of its corporate powers.

Considering only right-of-way lands, then, if the land was acquired by grant the first inquiry will be as to what estate was conveyed by the grant. Conveyances for right-of-way purposes, even though in the usual form to convey a fee, are often construed to grant only an easement; [5] and, regardless of whether the right to hold land in fee is given to the railroad by its charter, it seems that the grant to the railroad will be considered in the light of the purpose for which the land was acquired and construed to give only that interest which is reasonably necessary for the accomplishment of the purpose.[6] On the other hand, if the land is acquired by condemnation under a power of eminent domain, the extent of the interest taken depends upon the authority conferred by statute. Generally eminent domain statutes are construed to give only the power to take what is usually termed an easement [7] but which in fact seems to be an interest sui generis, resembling an easement in many particulars but also possessing some of the qualities of a fee, either determinable or simple.[8]

When title is acquired by adverse possession, however, the fairly definite indications of the extent of the title acquired which are found in the charter or grant in the case of condemnation or purchase are lacking. Instead there are only acts of possession by the railroad and perhaps some evidence of its claim of title to which those acts can be referred. Assuming that, as in Michigan,[9] the railroad can acquire both title in fee simple by grant and some interest by adverse possession, the difficulty of interpreting the acts of the railroad as giving an easement by prescription or a fee by adverse possession becomes apparent. The

[5] E.g., Jones v. Van Bochove, 103 Mich. 98, 61 N. W. 342 (1894); Danielson v. Woestemeyer, 131 Kan. 796, 293 P. 507 (1930); Kansas City Southern R. R. v. Sandlin, 173 Mo. App. 384, 158 S. W. 857 (1913). See also Brightwell v. International-Great Northern R. R., 121 Tex. 338, 49 S. W. (2d) 437, 84 A. L. R. 265 at 271 (1933). In general, see 2 ELLIOTT, RAILROADS, 3d ed., § 1153 (1921).

[6] 2 ELLIOTT, RAILROADS, 3d ed., § 1153 (1921); Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905).

[7] 2 ELLIOTT, RAILROADS, 3d ed., § 1222 (1921); for an extreme example, see Chouteau v. Missouri Pac. Ry., 122 Mo. 375, 22 S. W. 458, 30 S. W. 299 (1894).

[8] 2 ELLIOTT, RAILROADS, 3d ed., § 1222, pp. 759-760 (1921); and see Western Union Tel. Co. v. Pennsylvania R. R., 195 U. S. 540, 25 S. Ct. 133 (1904); Smith v. Hall, 103 Iowa 95, 72 N. W. 427 (1897).

[9] Felton v. Wedthoff, 185 Mich. 72, 151 N. W. 727 (1915), adverse possession; Munroe v. Pere Marquette R. R., 226 Mich. 158, 197 N. W. 566 (1924), adverse possession; Quinn v. Pere Marquette R. R., 256 Mich. 143, 239 N. W. 376 (1931), title in fee by grant.

railroad's possession of its right-of-way will be exclusive whether it holds a fee or only an easement,[10] and it is probably true that ordinarily the use which it makes of the right-of-way will be approximately the same whether it holds the land in fee or not. On the face of the matter, then, no definite conclusions as to whether the railroad takes a fee or an easement can be drawn merely from the acts of user or possession. Similarly it is difficult to draw any conclusions where there has been no definite claim of title made other than by the acts of user and possession themselves, for the acts themselves are equivocal and some portions of the right-of-way in question are probably held in fee simple while others are held only as an easement for railroad purposes. Likewise, probably portions have been acquired by grant while others have been acquired by condemnation. Consequently, no inference follows, as of course, that the railroad's claim of title is either fee or easement.

The acts and claim of title being equivocal, the extent of the interest acquired seems to depend principally upon the disposition of the courts to regard the railroad corporations as a special type, whose holdings in land are to be limited by the public nature and purposes of the corporations. That such a disposition exists is well established. The rules already referred to as limiting the use of right-of-way lands,[11] the tendency to construe grants to railroads to give only the interest necessary to the purpose for which they were purchased,[12] and the strict construction given statutes delegating the power of eminent domain to railroads,[13] all indicate unmistakably that particularly in regard to land acquired and held for right-of-way purposes railroad corporations are not treated in the same manner as ordinary private corporations or individuals. These rules are, of course, based upon the public functions, duties and nature of railways. The same policy has generally led to the decision that by use of land for a right-of-way the railroad acquires only an easement for railroad purposes.[14] Indeed, basically these same

[10] 1 NICHOLS, EMINENT DOMAIN, 2d ed., 600-601 (1917). So, ejectment will lie. Birmingham Sawmill Co. v. Southern R. R., 210 Ala. 126, 97 So. 78 (1923); Flint & P. M. R. R. v. Detroit & B. C. R. R., 64 Mich. 350, 31 N. W. 281 (1887). In most jurisdictions the railroad is entitled to exclusive possession as a matter of law, but in some it is a question of fact as to whether it is necessary for the railroad. Kansas Cent. Ry. v. Allen, 22 Kan. 203 (1879). See also annotation, 47 A. L. R. 549 at 552 (1927).

[11] See cases cited supra, notes 3 and 4.

[12] Supra, note 5, and annotation 84 A. L. R. 265 at 271 (1933).

[13] 2 ELLIOTT, RAILROADS, 3d ed., § 1222 (1921); 1 NICHOLS, EMINENT DOMAIN, 2d ed., § 192 (1917).

[14] 1 ELLIOTT, RAILROADS, 3d ed., §§ 462, 463 (1921); Pennsylvania R. R. v. Breckenridge, 60 N. J. L. 583, 38 A. 740 (1898); Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020 (1903); Hoffman v. Zollman, 49 Ind. App. 664, 97 N. E. 1015 (1912); Brinker v. Union Pacific, D. & R. G. Ry., 11 Colo. App. 166, 55 P. 207 (1898).

considerations have impelled some courts to hold that a railroad may acquire no interest in land by adverse possession and user thereof.[15] Assuming, however, that some interest in land may be acquired by adverse possession, a different result may possibly be expected where the adverse possession is under color of title in fee simple, or where the acts of user of the right-of-way are more extensive than would be consistent with a claim to an easement alone.[16]

The majority opinion in the principal case seems to intimate that the railroad cannot acquire a greater interest than is necessary for its operations by adverse user of a right-of-way. Taken in its full implications, this involves, of course, considerably more emphasis on the nature of the railroad corporation and the policy of limiting its interest in land than does the concurring opinion of Butzel, J. The latter preferred to hold merely that the railroad takes only an easement where its adverse possession has been confined to use of the land as a right-of-way, leaving open the question whether the railroad can take a greater interest where the acts of possession or the color or claim of title were inconsistent with other than a fee ownership of the land. The dissenting justices, on the other hand, saw no reason to apply a different rule or interpretation to the exclusive possession of the railroad than would be applied to exclusive possession by an individual. It seems to the writer that no particular injustice is done by allowing the railroad to take only an easement, and that the fact that only an easement for right-of-way purposes is ordinarily required for proper operation of the railroad tends to justify requiring the railroad claiming by adverse possession to show more than acts consistent with ownership of an easement before it can be held to have taken a fee by limitation. However, the writer is inclined to agree with the implication of the concurring justice that the case might well be different if there were acts of possession inconsistent with an easement for railroad purposes alone, or if there were color of title in fee or perhaps even express claim of title in fee.

Of course, if it be concluded that the railroad has acquired only an easement by prescription, either because its user and claim of title are no greater or because it is not allowed to acquire by adverse user a greater interest in land than its public purposes justify, it follows from

[15] Narron v. Wilmington & W. R. R., 122 N. C. 856, 29 S. E. 356 (1898); Connellsville Gas Coal Co. v. Baltimore & O. R. R., 216 Pa. 309, 65 A. 669 (1907).

[16] See language so intimating in Brinker v. Union Pacific, D. & R. G. Ry., 11 Colo. App. 166, 55 P. 207 (1898); and in Covert v. Pittsburgh & W. R. R., 204 Pa. 341, 54 A. 170 (1903), a railroad taking as purchaser from one holding by adverse possession under a deed giving color of title was permitted to tack its possession and its grantor's possession to make up the period of limitation. Note that this was allowed even though in Pennsylvania a railroad cannot usually acquire land by adverse possession. Connellsville Gas Coal Co. v. Baltimore & O. R. R., 216 Pa. 309, 65 A. 669 (1907).

the very nature of an easement that no rights are acquired to the minerals beneath the surface of the land.[17] It is to be remembered, however, that the owner of the fee will not be allowed to enter in order to drill for oil and gas or to conduct any subsurface operations that might impair the operation of the railroad,[18] and also, that even if the railroad might in a proper case take the fee to the land, its user will be limited by the rules referred to above, which are consequences of the public nature of the railroad. From this same public nature comes the policy which impels the holding of the principal case that an easement for right-of-way purposes alone can be taken by adverse possession. The essential soundness of the policy seems fairly established, but that it should override the usual rules of adverse possession where the railroad holds under a claim or color of title in fee simple, or where the user is more extensive than would be consistent with an easement in the railroad, seems open to serious doubt.

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[17] Southern Pacific R. R. v. San Francisco Savings Union, 146 Cal. 290, 79 P. 961 (1905); Consumers' Gas Trust Co. v. American Plate Glass Co., 162 Ind. 393, 68 N. E. 1020 (1903); Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co., 106 Tex. 94, 157 S. W. 737 (1913); Uhl v. Ohio River R. R., 51 W. Va. 106, 41 S. E. 340 (1902).

[18] 2 SUMMERS, OIL AND GAS, perm. ed., § 220 (1938); Midland Valley R. R. v. Sutter, (C. C. A. 8th, 1928) 28 F. (2d) 163.