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DEEDS - CONSTRUCTION - EFFECT OF WORDS SHOWING PURPOSE OF GRANT

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DEEDS — CONSTRUCTION — EFFECT OF WORDS SHOWING PURPOSE OF GRANT — Plaintiff sought to enjoin defendants from drilling for oil and gas on a strip of land which defendants claimed through a "right of way deed" conveying and warranting the strip to a railroad company "as and for its right of way" and describing the land as "across and upon" a certain quarter-section. The deed recited as consideration $250 and the benefits accruing to the grantor

through the construction and operation of a railroad on the land. Tracks were never laid on the strip, but the railroad company continued to pay taxes thereon. *Held*, that under Illinois law a fee simple estate and not an easement passed by virtue of this deed and the injunction was therefore properly denied. *Carter Oil Co. v. Welker*, (C. C. A. 7th, 1939) 112 F. (2d) 299.

It is generally held that words showing the purpose of a conveyance to a railroad company may operate to limit the alleged deed of a fee to one of an easement only.[1] It is only where the alternative to a fee simple is a determinable fee, rather than an easement, that the former is held to be transferred.[2] Some courts are committed to the doctrine that the intention of the parties should be the sole test in construing such deeds.[3] While in the principal case the intent to restrict the uses to which the land could be put[4] is less clear than in most cases wherein easements only are held to pass,[5] the decision cannot be reconciled with these cases on any such basis; for by the reasoning of the court even an unequivocably expressed intention to the contrary will have no effect to limit the estate conveyed. The decision is equally difficult to reconcile with the established policy of Illinois toward railroad properties. The desire to limit railroad titles is demonstrated by a constitutional provision stipulating that upon abandonment of a track, the use of that portion of the right-of-way acquired by eminent

[1] Magnolia Petroleum Co. v. Thompson, (C. C. A. 8th, 1939) 106 F. (2d) 217; Blakely v. Chicago, K. & N. Ry., 46 Neb. 272, 64 N. W. 972 (1895); Norton v. Duluth Transfer R. R., 129 Minn. 126, 151 N. W. 907 (1915); Midland Valley R. R. v. Corn, (D. C. Kan. 1927) 21 F. (2d) 96; Barlow v. Chicago, R. I. & P. R. R., 29 Iowa 276 (1870); 2 THOMPSON, REAL PROPERTY, 3d ed., § 462 (1939). An indication of the state of authority is provided in a note to the Magnolia case, 106 F. (2d) 217 at 227, which cites 23 cases in accord with it and 13 as espousing the view of the principal case.

[2] Board of Supervisors of Warren County v. Patterson, 56 Ill. 111 (1870); Downer v. Rayburn, 214 Ill. 342, 73 N. E. 364 (1905), both of which were relied on by the district court below in the principal case, (D. C. Ill. 1938) 24 F. Supp. 753. That court apparently lost sight of the difference between easements and determinable fees. See 27 ILL. B. J. 275 (1939). Courts and legislatures generally look with disfavor on determinable fees, since they tend to defeat vested interests and put the state of titles in doubt. Noyes v. St. Louis, A. & T. H. R. R., (Ill. 1889) 21 N. E. 487.

[3] Arkansas Improvement Co. v. Kansas City Southern R. R., 189 La. 921, 181 So. 445 (1938); Johnson v. Valdosta, M. & W. Ry., 169 Ga. 559, 150 S. E. 845 (1929); Waller v. Hildebrecht, 295 Ill. 116, 128 N. E. 807 (1920); 2 DETROIT L. REV. 188 (1932).

[4] Such intent is shown by the title "right-of-way deed," by the phrase "as and for its right of way" (which is mere surplusage if the estate granted is a fee), by the words "over and across" (which the court calls words of boundary description only), and by the recitation of railroad construction as a part of the consideration.

[5] Where, for example, deeds conveyed land "for so long as the same shall be used as a right-of-way," Norton v. Duluth Transfer R. R., 129 Minn. 126, 151 N. W. 907 (1915); "particularly for the purpose of erecting a railroad," Louisville & N. R. R, v. Maxey, 139 Ga. 541, 77 S. E. 801 (1913); and "for right-of-way and for operating its railroad only," Blakely v. Chicago, K. & N. Ry., 46 Neb. 272, 64 N. W. 972 (1895).

domain reverts to the holder of the adjoining fee.[6] Even where the abandoned strip was acquired by voluntary conveyance, there arises a presumption, under Illinois law, that the estate granted is an easement only.[7] The court in the principal case, however, concluded that the presumption was in favor of a fee simple, through a misapplication of a statutory provision that a fee simple is to be presumed "if a less estate be not limited by express words." [8] Since "limitation of estate" has to do only with the duration of the estate and not with the nature of the interest,[9] the statute in reality had no application to the facts before the court. The principal argument of the court is that the authorities holding only easements to pass by virtue of such deeds fail to distinguish between deeds conveying "land" and deeds conveying "rights" in land—more particularly, right-of-way easements. The distinction between "land" and "right" is, however, artificial; for any estate in "land" is no more than a "bundle of rights," and a fee simple is merely the sum total of all the "rights" in and upon that "land." [10] Furthermore, the word "land" is ordinarily used to designate the physical property in which the estate is given,[11] not to describe the interest conveyed or to emphasize the transfer of a corporeal hereditament. From an economic standpoint, the principal case does not present the more practical view; for unless the grantor may make use of the abandoned strip together with his adjacent land, it must lie fallow until the railroad company can dispose of it. Courts and legislatures everywhere are strongly opposed to conveyances whereby narrow, isolated strips of land are separated in ownership from land of which they are a natural part,[12] not only because they make for confusion of titles and boundaries when

[6] Ill. Const. (1870), Art. II, § 13. To the effect that a deed conveying land to a railroad for right-of-way gives the railroad no more rights than it would have if it had acquired it by condemnation, see 2 THOMPSON, REAL PROPERTY, 3d ed., § 461 (1939).

[7] St. Louis & B. Electric Ry. v. Van Hoorebeke, 191 Ill. 633, 61 N. E. 326 (1901); Waller v. Hildebrecht, 295 Ill. 116, 128 N. E. 807 (1920). There is an analogy in the highway cases, where, on abandonment of the road, the use of the roadbed reverts to the owner of the adjacent land. Chicago & E. I. Ry. v. Willard, 245 Ill. 391, 92 N. E. 271 (1910); 4 TIFFANY, REAL PROPERTY, 3d ed., § 1256 (1939).

[8] Ill. Stat. Ann. (Smith-Hurd 1935), c. 30, § 12.

[9] BLACK, LAW DICTIONARY, 3d ed., 1119 (1933); PROPERTY RESTATEMENT, § 23 (a) (1936).

[10] Oskaloosa Water Co. v. Board of Equalization of City of Oskaloosa, 84 Iowa 407, 51 N. W. 18 (1892); 2 BOUVIER, LAW DICTIONARY, 8th ed., 1827 (1914), says "Land has been held to include . . . easements . . . and all rights thereto and interests therein, equitable as well as legal."

[11] 2 BOUVIER, LAW DICTIONARY, 8th ed., 1827 (1914); 2 BLACKSTONE, COMMENTARIES 16 (1756).

[12] Roxana Petroleum Corp. v. Sutter, (C. C. A. 8th, 1928) 28 F. (2d) 159; 4 TIFFANY, REAL PROPERTY, 3d ed., § 1256 (1939); 27 ILL. B. J. 275 (1939). The most familiar situation in which the effort of the courts to prevent separate ownership of such strips appears is presented in the boundary dispute cases. There, deeds describing property as running to the side of a road are presumed at common law to include all the land to the middle of the road unless a contrary intention is clearly shown. Low v. Tibbetts, 72 Me. 92 (1881); Bowers v. A. T. & S. F. Ry., 119 Kan. 202, 237 P. 913 (1925).

roadbeds disappear, but also because narrow strips of rural land are of themselves of little use except for railroad and highway purposes.[13]

[13] The district court in the Carter case relied strongly on Weihe v. Lorenz, 254 Ill. 195, 98 N. E. 268 (1912), in which the deed conveyed the adjacent property in fee and the strip for a special purpose. There the court held that the strip was conveyed in fee, since only by so holding could it keep the title of the strip and the adjoining land in the same party. Thus the case is, if anything, authority against the ruling of the principal case.