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Charles Melvin Neff

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By CHARLES MELVIN NEFF*

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In *Northern Pacific Ry. Co. v. Townsend* (1903), by the second section of the Act of Congress, approved July 2, 1864, 13 Stat. 365, the United States granted to the Northern Pacific Railroad Company, its successors and assigns, a right of way through certain public lands in Minnesota, for railroad purposes. The Northern Pacific Railway Company acquired the railroad and property of the former company on August 31, 1896, by purchase at a sale under foreclosure of certain mortgages.

The first company signified its acceptance in writing, as provided in the Act and filed a map of definite location, and the road was constructed. It was held that thereupon the land forming the right of way was taken out of the category of public land subject to preemption and sale, and that the land department was without authority to convey rights therein. Homesteaders filing entries thereafter can acquire no interest in such land within the right of way on the ground that the grants to them were of full legal subdivisions the descriptions whereof include part of the right of way.

The court also held that "the fee passed by the grant made in Section 2 of the Act of July 2, 1864. * * * The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same as long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted." Affirmed on this point in *Northern Pacific Ry. Co. v. Ely* (1904), 197 U. S. 1.

In *Montgomery v. Atchison T. & S. F. Ry. Co.* (Oklahoma, 1937), 89 F. 2d 94, "the remaining question whether by long continued use plaintiff and others acquired a prescriptive right of way of passage over and along the right of way from the east end of the alley southward to Main Street. It is stated in the brief of the company, and not challenged in the reply brief of plaintiffs, that the right of way in question is a part of that acquired under the terms of the Act of July 4, 1884, 23 Stat. 73.

*Of the Denver Bar.

"That statute expressly vested in the Southern Kansas Railway Company the right to acquire a right of way through the Indian Territory; specified the manner in which the Indian nations should be compensated; and provided that full compensation should be made before the railway was constructed through lands held by individual occupants; that no part of the land granted should be used except for railroad, telegraph, and telephone lines; and that, if any portion should cease to be so used such portion should revert to the nation of Indians from which it came. Individuals cannot acquire for private purposes a prescriptive right by long use or occupancy in lands which were specifically granted in that manner and with such limitations, without the sanction of the United States. *Northern Pacific Ry. Co. v. Smith,* 171 U. S. 260; *Northern Pacific Ry. Co. v. Townsend,* 190 U. S. 267," etc.

(b) *Rights of way obtained by condemnation:* Colorado holds to the doctrine that eminent domain statutes must be strictly construed. *Pueblo v. Rudd* (1880), 5 Colo. 270, 272. So in Colorado, a statutory dedication of land for a particular public use is considered to create an estate of this character (i. e., determinable fee) "in the public subject to termination upon the cessation of such use." Tiffany on Real Property, Third Edition, Vol. 1, Sec. 220, note 85, citing *Lithgow v. Pearson* (1913), 25 Colo. App. 70, 135 Pac. 759.

The facts in the *Lithgow v. Pearson* case were these: Long before 1909, The Denver Circle Railway Company had condemned a right of way across certain lots. The decree of condemnation rendered in favor of the Railroad Company contained the following language: "It is further ordered that the said petitioner may take, retain, hold and use the said above described land for the purpose specified in said petition, to-wit, for railroad purposes."

Section 2420 of the 1872 condemnation statute of the state of Colorado under which the Railroad Company condemned announced, "Upon the entry of such rule the said petitioner shall become *seized in fee,* except as hereinafter provided," but, following the phrase, "seized in fee," and in the same sentence in which it occurs, we find the following: "And it may take possession of and hold the same for the purposes specified in said petition."

After the road had been operated for a time the right of way was abandoned and the tracks taken up. Thereafter no attempt was ever made by the Railroad Company or any successor to use this old right of way for public purposes of any sort.

After the abandonment of the right of way by the Railroad Company, by certain mesne conveyances Pearson became vested with whatever title, if any, the Railroad Company had at the time of said conveyances, to the narrow strip of land which it had acquired by the early condem-

nation proceeding. If upon the abandonment of the right of way by the Railroad Company the title reverted to the fee owners, then Pearson had and acquired no title whatever to the strip. The court concluded that Pearson took no title at all to the strip by reason of the conveyance made or attempted to be made by the Railroad Company to his predecessors in title.

The court said: "Our conclusion is that the Denver Circle Railway Company took a terminable or qualified fee in the right of way here involved, which was liable to be defeated whenever it ceased to use the land for the purpose contemplated by our Constitution and the decree rendered in its favor. And it follows, since the evidence clearly establishes absolute and permanent abandonment of this right of way by the said company, that appellee's pretended title to the land condemned by the city, and involved in this proceeding, is without foundation."

The court therefore declared that under the condemnation statute of Colorado as it then existed a right of way acquired by a railroad corporation by condemnation reverts to the original owner of the fee upon the same being abandoned by the corporation.

The same provision under which the above named railroad condemned may now be found in Sec. 6, Ch. 61, Colorado Statutes Annotated of 1935.

The rule may be stated as follows: If a public utility is authorized by statute to acquire by condemnation a "fee simple" estate in land to be used for public service only such a "fee simple" is merely a "terminable fee," and the abandonment of the service automatically ends the fee, and the public utility thereafter has no interest in the land which it can convey. This is so because the fee simple given by the statute is not a fee simple absolute. In harmony with this case see *Henry v. Columbus Teapot Co.* (1939), 135 Ohio State 311, 20 N. E. 2d 921, and see *Brightwell v. International-Great Northern R. Co.* (1932), 121 Texas 338, 49 S. W. (2d) 437, 84 A. L. A. 265 at 268.

(c) *Rights of way obtained by voluntary sale and purchase:*

If, on the other hand, the railroad company, in a transaction of voluntary sale and purchase, is given a deed in the form of a general warranty deed, purporting to convey to it an estate in fee simple in a strip of land over that of the grantor the grantee railroad company acquires an absolute fee simple to the strip and not a terminable fee to the strip, nor a so-called easement of right of way. *Radetsky v. Jorgensen* (1921), 70 Colo. 423, 202 Pac. 175.

The case of *Radetsky v. Jorgensen* (1921), 70 Colo. 423, 202 Pac. 175, is as follows: The plaintiff by a deed, in the form of a general warranty deed, recited in the granting clause that the grantors grant, bargain, sell and convey to the grantee railway company, "its successors

and assigns forever, all the following described lot or parcels of land * * * to-wit: 'A strip of land one hundred feet wide of which the center line of the route and line of said railway as the same is now surveyed, staked and located, is the center, being 50 feet each side of the center line of said route, over, across, and through the following described land, etc.' "

Since the deed purported to convey a strip of land 100 feet wide and not merely the right of way over a strip 100 feet wide, and since the railroad company by its charter and under the law was permitted to acquire the fee simple absolute in property, the court held it did acquire such a fee simple and not merely an easement or terminable fee.

There was a vigorous dissenting opinion by Mr. Justice Teller, who pointed out that the deed, in three places, mentioned the strip as a right of way.

The court in the *Radetsky* case said: "In reading this conclusion we have not overlooked the case of *Lithgow v. Pearson*, 25 Colo. App. 70, 135 Pac. 759, holding that a railroad acquiring a right of way by condemnation proceedings takes and can take only a terminable fee. The fact that only an easement or a terminable fee may be acquired by the exercise of the power of eminent domain does not preclude the acquisition of an estate in fee simple by purchase from the owner." See, also, in harmony, *Marland v. Gillespie* (1934), 168 Okla. 376, 33 Pac. (2d) 207. Further consideration of these two sorts of acquisition, one by condemnation, the other by voluntary purchase, may be found in *Carter Oil Co. v. Welker, et al.* (1938), 24 Fed. Supp. 753, and in *Magnolia Petroleum Co. v. Thompson* (1939), 106 Fed. 2d 217.

Switzer v. Chaffee County (1922), 70 Colo. 563, 203 Pac. 680, held that a quitclaim deed which conveyed a strip of land 100 feet wide, and not merely a right of way over said strip, conveyed the fee simple absolute to the strip, and that though it abandoned all use of the strip, it still owned it and could convey a good title to it.

In B. & Colo. R. R. Co. v. Colo. E. R. R. Co. (1906), 38 Colo. 95, 88 Pac. 154, the Supreme Court of Colorado had before it for consideration a deed which conveyed a right of way for a ditch to be used for irrigation and manufacturing purposes by the grantee. This deed provided that "whenever said right of way shall be finally abandoned for the purposes hereinabove set forth, then the rights hereby granted shall cease and revert to the respective parties of the first part." The court declared, and so held, that: "This clause in the deed should be construed as a limitation, and not as a condition subsequent; and, therefore, upon the happening of the event provided, the control and use of the land would pass to the owner of the fee without entry or claim," citing *Owen v. Field* (1869), 102 Mass. 90-106, and *Mitchell v. Bour-*

bon County (1903), 25 Ky. L. Rep. 512, 76 S. W. 16. It will be noted that the court called the right of way an "easement."

(d) *By Warranty Deed Authorized by Acts of Congress:*

The Act of March 3, 1873, Ch. 266, 17 Stat. 602 (Rev. Stat. Sec. 2288), provides that any bona fide settler may convey by warranty deed a right of way for railroads. And the Act of March 3, 1905 (33 Stat. 991) also so provides. See *Minnedoka R. R. Co. v. United States* (1914), 235 U. S. 211. In *Abercrombie v. Simmons* (1906), 71 Kansas 538, 81 Pac. 208, 1 L. R. A. (N. S.) 806, 114 Am. St. Rep. 509, 6 Am. & Eng. Anno. Cas., the Supreme Court of Kansas held, according to the syllabus prepared by the court, that: "An instrument which is in form a general warranty deed, conveying a strip of land to a railroad company for a right of way, will not vest an absolute title in the railroad company but the interest conveyed is limited by the use for which the land is acquired, and when that use is abandoned the property will revert to the adjoining owner."

"Now, as we have seen, the deed and those things to which we may look in its interpretation plainly show that the strip was sold on the one part, and purchased on the other, as and for a right of way for a railroad. This use, being within the contemplation of the parties, is to be considered as an element in the contract, and limits the interest that the railroad acquired. It took the strip for a specific purpose, and could hold it so long as it was devoted to that purpose. Whether the right of way purchased should be designated as an easement or as a qualified or determinable fee may not be very important. A right of way, although commonly designated as an easement, is an interest in the land of a special and exclusive nature, and of a high character. In speaking of its character the Supreme Court of the United States said:

> "A railroad right of way is a very substantial thing. It is more than a mere right of passage. It is more than an easement. We discussed its character in *New Mexico v. United States Trust Co.*, 172 U. S. 171, 19 Sup. Ct. 128, 43 L. Ed. 407. We there said (p. 183) that if a railroad's right of way was an easement it was 'one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property.' " *(Western Union Tel. Co. v. Penn. R. R., et al.*, 195 U. S. 540, 570, 25 Sup. Ct. 133, 141, 49 L. Ed. 312.)

Commenting on the Abercrombie case, the Colorado Court of Appeals said in *Lithgow v. Pearson, supra,* a condemnation case under a state statute, "It is not necessary in the instant case for us to go so far as the rule announced in the Abercrombie case, we simply cite it as showing the tendency of the courts."

13. *Procedure indicated upon breach of condition.*

(a) Where there is a breach of the condition in the case of a true right of possibility of reverter no action is required by the grantor to place the title again in his hands. Upon the breach the grantor is thereby automatically reinvested with the title. If the grantee refuses to acknowledge reinvestment in the grantor and to yield up possession the grantor may, as owner, sue in ejectment to oust the grantee. See *Colwell v. Colorado Springs* (1876), 3 Colo. 82, affirmed in 100 U. S. 50; *Burlington & C. R. Co. v. Colo. Eastern R. Co.* (1906), 38 Colo. 95, 88 Pac. 154; *El Paso County, et al. v. City of Colorado Springs* (1919), 66 Colo. 111; 180 Pac. 301.

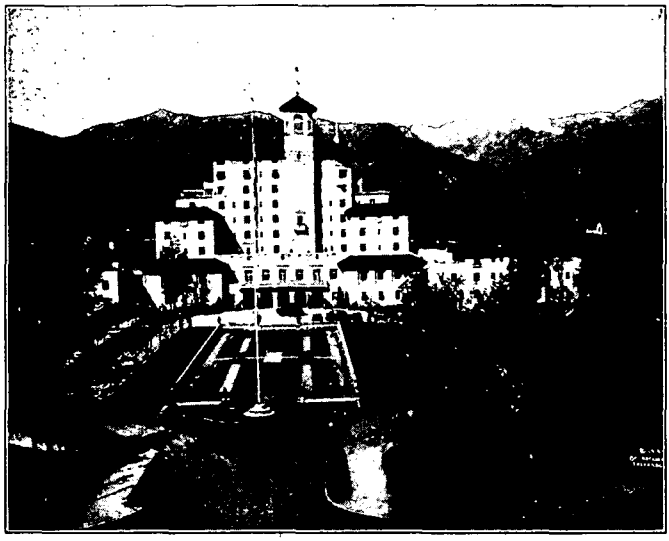
(b) Where, however, the condition is a condition subsequent a breach thereof gives to the grantor nothing more than a right of re-entry. There is here no automatic reinvestment of the title back into the hands of the grantor. It is necessary, therefore, that he make a re-entry, and until re-entry is made—and it might never be made—the title remains in the hands of the grantee. Thompson Real Property, Permanent Edition, Vol. 4, Section 2129, citing, among many cases, *Denver & S. F. R. Co. v. School District* (1890), 14 Colo. 327, 23 Pac. 978; *Union Colony v. Gallie* (1939), 104 Colo. 46, 88 Pac. (2d) 120.

This difference between the two types of reverter indicates the necessity for title attorneys of determining whether in cases of condition subsequent a proper action of re-entry has been taken by the grantor. If not, title must be held to be in the grantee.

(c) *Procedure continued.* It may be that the deed itself provides the method by which the title upon condition broken shall revert to the grantor. Thus in *Fusha, et al. v. Dacono Townsite Company* (Dec., 1915), 60 Colo. 315, 153 Pac. 226, Ann. Cas. 1917 C. 108, the conveyance was upon condition that intoxicating liquors should never be sold upon the premises, except by druggists for medicinal purposes, and it was expressly provided therein that "in case of and upon the adjudication of a court of competent jurisdiction that this condition and covenant has been violated by said second party, his heirs, executors, administrators or assigns, the title to the premises hereby conveyed, and every part thereof, shall revert to and revest in said first party, its successors and assigns."

The court held that "demand for possession, claim or entry upon the land was not essential before instituting the action," though under the terms of the conveyance "an action and adjudication of the court was essential to reinvest the title to the premises in the plaintiff."

The End.



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