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Railroad, Grants, and Condemnation - Title and Interest Acquired in Railroad Rights-of-Way

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ation act violated the Fourteenth Amendment. The court said it has long been settled that a state may modify or reject the riparian doctrine and adopt the appropriation system, but in so doing it must recognize valid and existing vested rights.[31] Then the federal tribunal declared, *"We do not regard a landowner as having a vested right in underground waters underlying his land which he has not appropriated and applied to beneficial use."*[32]

The court also said that even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process.[33] There is no vested right in the decisions of a court. They went on to say it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when it is in the public interest.[34]

Another Kansas case, dealing with surface waters, earlier upheld the constitutionality of the Kansas appropriation statutes.[35] They said here that earlier decisions had been approached on the basis of individual interest alone. Now they thought it necessary to take a broader view of the situation and weigh more heavily the public welfare. The state's highest tribunal claimed unused or unusable rights predicated alone upon theory become of little if any importance. The court in this case also felt that broad general statements in earlier decisions must be disregarded or modified to harmonize with the will of the legislature..

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RAILROAD, GRANTS, AND CONDEMNATION

Title and Interest Acquired in Railroad Rights-of-Way

I. HISTORY

The concept of land subsidies for the development of the vast areas of the West was promulgated before the Constitution of the

31. United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703 (1899); Williams v. City of Wichita, Kansas, 279 F.2d 375, 377 (1960).

32. Baumann v. Smhra at 624. For a discussion of the troublesome question of unused overlying rights, see Kirkwood, *Appropriation of Percolating Water*, 1 Stan. L. Rev. 1 (1948). Dean Kirkwood believes that limiting vested rights to those actually used is legally sound. But see, Peabody v. Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935); San Bernadino v. Riverside, 186 Cal. 7, 198 Pac. 784 (1921); Burr v. Maclay Rancho Water Co., 154 Cal. 428, 98 Pac. 260 (1908).

33. O'Neil v. Northern Colorado Irrigation Co., 242 U.S. 20, 26, 27 (1916).

34. Silver v. Silver, 280 U.S. 117, 122 (1929); United States v. United Shoe Machinery Co., 264 F. 138, 151 (8th Cir. 1920).

35. State v. Knapp, 165 Kan. 546, 207 P.2d 440 (1949).

36. *Id.* at 447.

37. *Ibid.*

United States. Shortly after the confederation was established, the Ordinance of May 20, 1785, was conceived to determine the mode of disposing the lands of the Western Territory. It prescribed a scientific system of identifying land with clear cut boundaries and titles. Actually, an earlier Ordinance, in 1784, provided for the artificial division of the entire West, into sixteen districts, eligible for statehood upon attaining a population of 20,000. This Ordinance was repealed, however, and the Ordinance of 1785 became the landmark in the orderly development of the United States.

The liberality with which the Congress granted lands to canal companies in the early seventeenth century prompted railroads to request like grants to aid in their enterprises. The most prominent was the Illinois Central in its attempt to connect the Southern part of the state with the more populous regions. In 1850, when this railroad was made intersectional — *interstate* — by an extension to the Gulf of Mexico, the Congress adopted a measure which gave to the States of Illinois, Mississippi, and Alabama, a right-of-way through the public lands, and the alternate sections for a distance of six miles on both sides of the road, or more specifically, 3840 acres of land for every mile of railroad.[1]

The rapid completion of this railroad led to the settlement of inaccessible areas and gave rise to immigration and land speculation. Such success prompted a scramble for land grants by railroad groups and a number of grants were made from 1850 to 1871. The most important of these were the famed trans-continentals — the Union Pacific[2] and the Northern Pacific.[3] In all, the Northern Pacific was granted 39 million acres of land to aid in the construction of the railroad.[4] More than one-eighth of all the public domain in the United States was granted to the various railroads, a grand total of 131 million acres of land.[5]

II. INTERESTS CONVEYED BY PUBLIC GRANTS

In order to determine ownership of oil and gas underlying a railroad's right-of-way, it is first necessary to determine what interests the railroads received from the United States via the grants of the public domain.

To proceed in a systematic fashion, the term right-of-way deserves clarification. Strictly, a right-of-way is the right to pass over

1. 9 Stat. 466 (1850).
2. 12 Stat. 489 (1862).
3. 13 Stat. 365 (1864).
4. 3 *Dictionary of American History* 237 ,1940) (Land Grants to Railways).
5. *Ibid.*

another man's ground, and in applying this right to railroads generally, it is an easement in the land of others.[6] But in practice, the term has a double significance. It is used to describe a right, belonging to a party, of passage over land; also, from the layman's viewpoint, right-of-way is used to describe that strip of land which the railroad companies take upon which to construct their roadbed.[7]

More specifically, whether or not the materials underlying these right-of-way grants were given to the railroads depends a great deal on whether, by the various grants, they took a fee or an easement. If the grant is to be construed as a determinable fee, the railroad would apparently have a right to the oil and gas under the right-of-way, while under an easement construction, the right is either in the United States or its patentees, the holders of the fee.[8] The cases supporting the fee concept declared the interest to be a base, limited, or a qualified fee.[9] In any event, a right-of-way is a very substantial thing.

The Iowa Supreme Court in speaking of a railroad's easement (right-of-way) said that "an easement is not that spoken of in the old law books, but is peculiar to the use of the railroad which is usually a permanent improvement, a perpetual highway of travel and commerce, and will rarely be abandoned by nonuse. The exclusive use of the surface is acquired and damages are assessed on the theory that the easements will be perpetual so that ordinarily the fee is of little or no value unless the land is underlaid by a quarry or mine."[10] The property interest acquired in a right-of-way is corporeal, and if not a fee, than an easement, not an ordinary easement, but one having the attributes of a fee, perpetuity, and exclusive use and possession.[11] The implications are that the interest created in a railroad's right-of-way lies somewhere between a qualified fee and an easement.[12]

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6. Williams v. W. U. Ry., 50 Wis. 76, 5 N.W. 486 (1880), the court further stated that "it would be using the term in an unusual sense, by applying it to an absolute purchase of the fee-simple of lands to be used for a railroad or any other kind of way."

7. See Joy v. St. Louis, 138 U.S. 1 (1891); Kenner v. Union Pac. Ry., 31 Fed. 126 (1887).

8. Great No. Ry. v. United States, 315 U.S. 262 (1942).

9. Oregon Short Line R.R. v. Stalker, 14 Idaho 362, 94 Pac. 56 (1907); a base or qualified is one which has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end, Wiggens Ferry Co. v. Railroad Co., 94 Ill. 83 (1879); and it may last forever if the contingency does not happen, McIntyre v. Dietrich, 194 Ill. 126, 128 N.E. 321 (1920). A limited fee denotes present ownership of an entire interest in land, an ownership that will continue as long as a stated contingency, leading to a reverter, does not occur, United States v. Union Pac. R.R., 353 U.S. 112, 130 (1957) (Dissenting Opinion).

10. Smith v. Hall, 103 Ia. 95, 72 N.W. 427 (1897).

11. New Mexico v. United States Trust Co., 172 U.S. 171 (1898).

12. MacDonald v. United States, 119 F.2d 821 (9th Cir. 1941); Denver & S. L. Ry. v. Pacific Lumber Co., 86 Colo. 86, 278 Pac. 1022 (1929).

Those cases which hold that a fee passed by the Congressional grants rely on the premise that the taking by grant was similar to taking by way of purchase. The consideration inducing the grant has been said to be the perpetual use of the land for the legitimate purpose of the railroad.[13] A greater degree of reliance is placed on the fact that a present grant, a qualified fee, was given subject to the expressed conditions of the Acts and those implied, such as the railroad shall be used for the purpose designed and that the land shall revert to the grantor in the event the company ceased to use or retain the land for the purposes for which it was granted.[14]

Some cases have held the interest to be a fee without determining who acquired the right to the minerals underlying the right-of-way.[15] One case went so far as to rule a fee was granted without making a distinction between a fee and an easement.[16] Other cases have simply held that the grant did not convey a fee,[17] although the interest acquired has the attributes of a fee for railroad purposes.[18]

These cases which support the easement theory rely heavily on statutory interpretations. In construing the grant under the Act of March 3, 1875, § 4,[19] the Court in *Great Northern Ry. v. United States*,[20] after stating the requirements of the location of the right-of-way, said, '. . . . thereafter all lands over which such right-of-way shall pass shall be disposed of subject to such right of way. This reserved right to dispose of lands is wholly inconsistent with the grant of a fee." The fee or servient estate remained in the United States. In other words, the act grants an easement only and confers no right to the oil and minerals underlying the right-of-way.[21]

13. Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1902); this ruling would tend to prohibit the use of the right-of-way for any other purpose for which it was granted, United States v. Great. No. Ry., 32 F.Supp. 651 (D. 1940).

14. Rio Grande W. Ry. v. Stringham, 239 U.S. 44 (1915); Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1903); MacDonald v. United States, 119 F.2d 821 (9th Cir. 1941).

15. Rio Grande W. Ry. v. Stringham, 239 U.S. 44 (1915); Missouri Kan. & Tex. Ry. v. Roberts, 152 U.S. 144 (1893); United States v. Illinois Cent. R.R., 89 F.Supp. 17 (D. 1949).

16. Missouri, Kan. & Tex. v. Roberts, 152 U.S. 144 (1893).

17. Northern Pac. Ry. v. Townsend, 190 U.S. 267 (1903); in construing the effect of the Act of June 24, 1912, the court said that the ownership of the right-of-way shall have the same effect as though the land within the right-of-way was granted absolutely or in fee as against adverse possessors. Apparently, by implication, the railroad did not take a fee by the Act of July 1, 12 Stat. 489 (1862), Union Pac. R.R. v. Laramie Stock Yards, 231 U.S. 190 (1913); *but cf.* "The Real Property Interest Created In a Railroad Upon Acquisition of Its Right of Way," 27 Rocky Mt. L. Rev. 73 (1954).

18. Midland Valley R.R. v. Corn, 21 F.2d 96 (D. 1927); "A railroad's right-of-way has the substantiality of a fee and it is private property even to the public in all else but an interest and benefit in its uses," Western Union Tel. Co. v. Penn. R.R., 195 U.S. 530 (1904).

19. 18 Stat. 482 (1875).

20. 315 U.S. 262 (1942).

21. *Ibid;* In Smith v. Townsend, 148 U.S. 490 (1893) and Railroad Co. v. Alling, 99 U.S. 463 (1878) statutory rights-of-way were held to be but easements.

The *Great Northern* case overruled earlier decisions which held that a railroad which took by grant under the Act of 1875 took a limited fee on an implied condition of reverter in the event the railroad should cease to use or retain the land for the purposes for which it was granted.[22] The railroad does not have an unrestricted use of its right-of-way and the owner in fee may use the servient estate for any purpose not inconsistent with the purposes of the easement.[23] The lower Court in the *Great Northern* case made the following observations: (1) nothing passes by a public grant except what is conveyed in clear and explicit terms, and all rights, privileges, and immunities not expressly granted are reserved, (2) the grants of right-of-way over public lands was for the purpose of constructing, maintaining, and operating the railroad, and property rights extend upwards for a space necessary for the use of its franchise and downward to a line of support for its tracts and superstructures, and (3) that grants of public lands in aid of railroads are to be strictly construed against the grantees, as a grant by the public to a private company.[24]

It is contended that as a result of the great Congressional policy shift in 1871, the grants prior to this time took a limited fee.[25] The *Great Northern* case[26] in ruling an easement was granted, overruled the *Stringham* case[27] which held that the interest acquired was a limited fee founded upon the grants of 1875, on the basis that this change in policy was not brought to the court's attention. The *Great Northern* case said that such a conclusion is inconsistent with the language of the act, its legislative history, its early administration, and the construction by Congress of subsequent legislation, and for these reasons the *Stringham* case is not controlling.

The *Union Pacific* case[28] took notice of the policy shift and the conclusions drawn by the Court in the *Great Northern* case, but made a further distinction that none of the "limited fee" cases involved the question of rights to subsurface oil and minerals. The

22. Himonas v. Denver & R. G. W. R.R., 179 F.2d 171 (1949); and see Missouri-Kansas-Texas R.R. v. Ray, 177 F.2d 454 (10th Cir. 1949).

23. Missouri-Kansas-Texas R.R. v. Freer, 321 S.W.2d 731 (Mo. 1958); "The former proprietor of the soil still retains the fee of the land and his right to the land for every purpose not incompatable with the rights of the railroad company. Upon discontinuance or abandonment of the right-of-way, the entire and exclusive property and right of enjoyment revests in the proprietor of the soil." Kansas Cent. Ry. v. Allen, 22 Kans. 225, 31 Am. Rep. 190 (1879).

24. United States v. Great No. Ry., 32 F.Supp. 651 (D. 1940); for other cases involving strict construction of grants see United States v. Denver & C. Ry., 150 U.S. 1 (1893) and Winona & St. Peter Ry. v. Barney, 113 U.S. 618 (1885).

25. Great No. Ry. v. United States, 315 U.S. 262 (1942); and see generally, 27 Rocky Mt. L. Rev. 73 (1954).

26. 315 U.S. 262 (1942).

27. 239 U.S. 44 (1915); and see footnote 14.

28. United States v. Union Pac. R.R., 353 U.S. 112 (1957).

Court went on to say that "there are no precedents which give the mineral rights to the owner of the right-of-way as against the United States. We would make a violent break with history if we construed the Act of 1862 to give such a bounty. We would indeed, violate the language of the Act itself." It is apparent then by this discussion that all mineral lands are reserved to the United States or its patentees. To strengthen this argument that all mineral lands are reserved, it can be safely said that there was no intent to include the mineral lands in the grants of the public lands. The railroads took the lands for the sole purpose of constructing their lines and no other.[29] One cannot acquire a vested interest in a rule of property on which he did not rely when he acquired an interest he seeks to protect.[30]

III. POLICY AND MINERAL RESERVATIONS

What was the federal government's policies with regard to mineral rights during this period of development? Was there any variance in this policy toward the right-of-way and the alternate sections of land granted to aid the construction? In the case of *United States* v. *Sweet*,[31] Justice Van Devanter said that by the Ordinance of May 20, 1785, it is settled policy of Congress to dispose of mineral lands only under laws specially including them. During the period of the great give-away program, the federal policy was to reserve to the government the mineral lands and not to grant them.[32] During the period of 1849 through 1866, the government wanted to aid the railroad companies in furnishing a link between the populous East and the unsettled West. Toward the end of this period, there was a great deal of dissatisfaction with this give-away program which turned over so much of the public domain to big business. Under public pressures, the policy of granting land subsidies to the railroads was discontinued in 1871, and crystallized in a House Resolution in 1872.[33] The Act af March 3, 1875,[34] was designed to curtail the subsidies but still encourage the development of the West by granting to designated railroads simply a right-of-way through the public land of the United States.[35]

29. MacDonald v. United States, 199 F.2d 821 (9th Cir. 1941); Midland Valley R.R. v. Corn, 21 F.2d 96 (D. 1927); Norfolk Southern R.R. v. Stricklin, 264 Fed. 546 (D. 1920).

30. Chicago v. North Western Ry. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958).

31. 245 U.S. 563 (1918).

32. Mining Company v. Consolidated Mining Company, 102 U.S. 167 (1880) in construing the Act of March 3, 1853, 10 Stat. 244 (1853) which was an act for the governing of public lands in California.

33. 42d Cong., 2d sess., 1585 (1872).

34. 18 Stat. 482 (1875), 43 U.S.C.A. § 934.

35. See Great No. Ry. v. United States, 315 U.S. 262, 274 (1942).

In the Union Pacific grant[36] Congress conveyed by section 2 "the right of way through the public lands . . . for the construction of said railroad and telegraph lines" and by section 3 granted every alternate section of public land on each side of the railroad; and provided that "all mineral lands shall be excluded from the operation of this act." The Supreme Court in *United States* v. *Union Pacific*[37] construed this grant to hold that the grant of the "right-of-way" through the public lands did not convey to the railroad the title to oil and gas deposits underlying the right-of-way, and the railroad may not in any way dispose of such deposits. The Court further pointed out that whatever rights may have been included in the grant of the right-of-way, the mineral rights were excepted by reasons of the provision in section 3 excepting "mineral lands," which they said extended to the entire act.

This mineral reservation policy was not clear until four years after the Union Pacific grant when the Act of July 26, 1866,[38] formally prescribed the procedure for asserting control over the mineral lands.

These various grants did make stipulations that the railroads could, in the course of construction, appropriate to their own use material along the right-of-way.[39] This provision tended to cloud the issue whether or not they were entitled to all of the minerals found. It was argued that by virtue of the right to construction materials, the railroads were also entitled to minerals. The Courts uniformly discarded these contentions and continued to reserve the mineral lands to the United States.[40] It is apparent that the federal policy after 1875 was to specifically reserve all mineral rights in land grants of the public domain to those that took by patent.

Actually, in 1864, Congress removed all doubt that mineral lands are reserved from grants of the public domain by stating "No act passed at the first session of the Thirty-eighth Congress granting lands to states or corporations to and in the construction of roads, or for other purposes or to extend the time of grants heretofore made, shall be so construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the

36. Act of July 1, 1862, 12 Stat. 489 (1862).
37. 353 U.S. 112 (1957).
38. 14 Stat. 251 (1866).
39. The Union Pacific grants stipulated that "the right, power, and authority is hereby given said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof." 12 Stat. 489 (1864).
40. Northern Pac. Ry. v. Soderberg, 188 U.S. 526 (1903); United States v. Denver & Rio Grande Ry., 150 U.S. 1 (1893); Wright v. St. Louis Southwestern R.R., 175 Fed. 845 (8th Cir. 1910).

grant."[41] The Courts have construed this act strictly against the Grantee.[42] The Courts have also construed the intent of Congress to exclude all mineral lands, known or unknown,[43] and if the lands were found to mineral the patent should be set aside.[44] The railroads were then entitled to indemnification if the lands were found to be mineral, but if the railroad fraudulently indemnified the original mineral lands by other mineral lands, the indemnified lands were also subject to be set aside.[45] This policy apparently covered all other grants of the public domain, *i. e.*, school lands.[46]

Congress by no means intended to freeze the minerals underlying the railroad grants after construction. Although they had no right to the minerals, after the Act of May 21, 1930, the railroads were free to develop the underlying minerals by lease from the United States at a prescribed royalty.[47]

From 1849 to the present time, Congress has created a series of acts expressly opening the mineral lands of the West to exploration, "Taken collectively, they constitute a special code upon that subject and show that they are intended not only to establish a particular mode of disposing of mineral lands, but also to except and reserve them from all other grants and modes of disposal where there is no express provision for their inclusion. Thus the policy of disposing of mineral lands only under laws specially including them became even more firmly established than before, and this is recognized by the decisions.[48]

Is this policy of Mineral Reservation inherent in the other modes of conveyancing, by deed and condemnation? What interest then did the railroads take by deed and what interest did they take if land was acquired under emminent domain?

EFFECT OF WORDS SHOWING PURPOSE OF GRANT: Generally, it may be said that a deed to a railroad company covering a right-of-way, but otherwise appearing to be an absolute conveyance, passes an easement only to the grantee, with the fee re-

41. 13 Stat. 567 (1864).
42. Northern Pac. Ry. v. Soderberg, 188 U.S. 526 (1903); Northern Pac. R.R. v. Sanders, 166 U.S. 620 (1894).
43. Barden v. Northern Pac. R.R., 154 U.S. 288 (1894).
44. Western Pac. R.R. v. United States, 108 U.S. 510 (1882)
45. United States v. Southern Pac. R.R., 251 U.S. 1 (1919); the general rule is that the question of mineral or non-mineral character of lands selected or entered shall be determined as of the time when the selector or entryman fully complied with the conditions precedent, *except*, where the land is confined to railroad land grants. The character of the lands is determined as of the time when the patent issues, Wyoming v. United States, 255 U.S. 489 (1921).
46. Mining Co. v. Consolidated Mining Co., 102 U.S. 167 (1880).
47. Great No. Ry. v. United States, 315 U.S. 262 (1942) in construing the Act of May 21, 1930, 46 Stat. 373 (1930).
48. United States v. Sweet, 245 U.S. 563 (1918).

maining in the grantor.[49] 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.[50] A "right-of-way" in its legal and generally accepted meaning in reference to a railroad company's interest in land, is a mere easement for railroad purposes.[51] The quantum of the interest thus conveyed is limited to those uses which are necessarily a proper incident in the maintenance and operation of the railroad.

Language reading . . . I hereby grant, bargain, sell and quitclaim unto the said New Orleans and Northeastern Railroad Company a right-of-way for 200 feet, through the following land towit . . . was held to be an easement or a gift of user rather than a fee.[52] Also where the deed read in part . . . has remised released and forever quitclaimed, . . . unto said party of the second part . . . for the purposes of Railroad right-of-way. Together with all singular tenements, hereditaments and appurtenances thereunto belonging or inanywise appertaining and the reversion and reversions, ramainder and remainders, rents, issues and profits thereof. The court held not withstanding the language used that a mere easement was passed and not a fee.[53] Thus where a railroad is conveyed a "right-of-way" for "all the uses and purposes of said railroad company so long as the same shall be used for the construction use and occupation of said railroad company" conveyed an easement only.[54] In this connection a habendum clause, in accordance with the general rule of construction, must yield to the granting clause, although in fact there is no conflict between the two clauses where the granting clause is for a railroad right-of-way and the habendum clause has no such limitation, since the habendum clauses may be interpreted as warranting the title to an easement which is granted in perpetuity.[55] Nor does the mere fact that a form of warranty

49. Flaten v. Moorhead, 51 Minn. 518, 53 N.W. 807 (1892); Highland Realty Co. v. San Rafael, 46 Cal.2d 669, 298 P.2d 15 (1956); Lillard v. Southern Ry., 330 S.W.2d 335 (Tenn. 1959).

50. See Downer v. Rayburn, 214 Ill. 342, 73 N.E. 364 (1905). As a practical matter the few cases which have been decided on this point construe the grant as a fee simple for purposes of alienation and a fee simple determinable for so long as the railroad is used for railway purposes, see Reichard v. Chicago B. & R.R., 231 Iowa 563, 1 N.W.2d 721 (1942); Epworth Assembly v. Ludington & N. Ry., 236 Mich. 565, 211 N.W. 99 (1926).

51. Green v. Kundel, 183 S.W.2d 585 (Tex. Civ. App. 1944). It would seem that since the definition of "right-of-way" is indefinite, the inquiry in each case should be determined from the language of the deed and the intent of the parties, University City v. Chicago, R. I. & P. Ry., 347 Mo. 170, 149 S.W.2d 321 (1941).

52. New Orleans & Northeastern R.R. v. Morrison, 203 Miss. 387, 35 So.2d 68 (1948).

53. Byrd v. Goodman, 195 Ga. 621, 25 S.E.2d 34 (1944); Swan v. O'Leary, 37 Wash.2d 533, 225 P.2d 199 (1950); Jackson v. Sorrells, 212 Ga. 333, 92 S.E.2d 513 (1956) (deed held to create a mere easement in railroad though *purporting* to be a fee).

54. Brown v. Weare, 152 S.W.2d 649 (Mo. 1941).

55. East Alabama R.R. v. Doe, 114 U.S. 340 (1885).

deed is used necessarily resolve the question in favor of the grantee, since the whole deed must be read in its entirety and the obvious intent be given its operative effect.[56] Language conveying to the railroad a right-of-way through and over land and providing that the railroad was to have and hold the land so long as it was required for railroad purposes, gave the railroad an "easement" and not a "base fee". Consequently when the railroad abandoned the right-of-way, the title to the land did not revert to the original grantor, but resulted in the extinguishment of the easement so that the land was owned in fee simple by the owner of the land on both sides of the right-of-way.[57]

Most courts have been reluctant to find a greater estate then an easement or railroad right-of-way; thus where the deed to the railroad company conveys a "right" rather than a strip, piece, parcel, or tract of "land" (the right or privilege of constructing, operating or maintaining a railroad) it must be construed as conveying an easement rather than a fee. This principle has been applied and recognized in numerous decisions.[58]

On the other hand where the conveyance to the railroads, which purport to grant and convey a strip, piece, parcel or tract of "land" and which do not contain additional language relating to the use or purpose to which the land is to be put or in other ways cutting down or limiting directly or indirectly, the estate conveyed is usually construed as passing an estate in fee.[59]

The interest that passes becomes important usually in two ways: (1) Where the railroad subsequently abandones the property[60] and (2) when minerals are discovered underlying the railroad's right-of-way.[61]

A railroad company which has a mere right-of-way over lands for railway purposes, is not privileged to drill thereon for oil and gas as against the owner of the land from whom the right-of-way

56. Cleavland C. & St.L. Ry. v. Central Ill. Pub. Service Co., 380 Ill. 130, 43 N.E.2d 993 (1942); Texas & Pac. Ry. v. Ellerbe, 199 La 489, 6 So.2d 556 (1942).

57. Fleck v. Universal Cyclops Steel Corp., 397 Pa. 648, 156 A.2d 832 (1959).

58. McClung v. Sewell Valley R.R., 97 W.Va. 685, 127 S.E. 53 (1924); Quinn v. Pere Marquette R.R., 256 Mich. 143, 239 N.W. 376 (1931); Lillard v. Southern R.R., 330 S.W.2d 335 (Tenn. 1959).

59. Gilbert v. Missouri K. & T. Ry., 185 Fed. 102 (8th Cir. 1911); Hale v. Davis, 170 Va. 68, 195 S.E. 523 (1938); Alabama & Vicksburg R.R. v. Mashburn, 235 Miss. 346, 109 So.2d 533 (1959). The deed involved was absolute in form.

60. Southern Ry. v. Griffitts, 304 S.W.2d 508 (Tenn. 1957).

61. Aubert v. St. Louis-San Francisco Ry., 251 P.2d 190 (Okla. 1953). The granting clause of the deed conveyed "the right-of-way for a railroad, telegraph and telephone over, through and across the lands of the grantor." There was nothing in the deed indicating an intent to convey a greater estate than an easement. It was held that the grantee received only the right at the surface and the title to the oil and gas did not pass.

was acquired.[62] When a right-of-way is obtained the right so acquired is generally held to be only applicable at the surface and may be used only in the operation of the railroad.

Even though the title to the oil and gas remains in the person from whom land is acquired, such person or successors in interest, or the oil and gas lessee is not privileged to produce the oil and gas from such right of way by drilling or operating wells thereon, if such operations interfere with or endangers the safe and convenient operation of the railroad.[63] Even where the abutting owner leases his land for oil and gas the same rule will be applied as to boundaries as is ordinarily applied to conveyances of land along railroads in absence of clear intention to the contrary, the lease will include the right of way. While such lessee may not drill wells on the right-of-way, he is, of course, privileged to take the oil and gas by either directional drilling from the servient estate or from wells vertically drilled on his own land. He may prevent such right of way oil and gas from being taken by his lessor or the latter's assigns or lessees.[64] Nor can the railroad claim that the oil and gas whch is found on the right-of-way be used in the maintenance and operation of the railroad and thus gain title indirectly.[65]

Where the railroad ceases operation or in some way evidences the intention to abandon the easement, the right-of-way reverts to the owner of the servient tenant or his successors in interest.[66]

It is important to note that if the interest conveyed is a mere "easement" the interest follows the servient tenement. Conversely, if the interest so conveyed is defined as a fee on a special limitation,[67] or a fee simple detminable,[68] the land will revert back to the

62. Midland Valley R.R. v. Sutter, 28 F.2d 163 (8th Cir. 1928) cert. denied 280 U.S. 521 (1929); Jones v. New Orleans & Northeastern R.R., 214 Miss. 804, 59 So.2d 541 (1952) (The owner had obtained title to land by adverse possession adjacent to a railroad right-of-way. The court held that he acquired the fee to the center of the roadbed).

63. Midland Valley R.R. v. Sutter, 28 F.2d 163 (10th Cir. 1928).

64. Roxana Petroleum Corp. v. Sutter, 28 F.2d 159 (10th Cir. 1928); Shell Petroleum Corp. v. Corn, 54 F.2d 766 (10th Cir. 1932).

65. Chicago v. Northwestern Ry. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958).

66. Where the servient estate in a strip of land is burdened with an easement for a railroad right-of-way, it passes with a conveyance in fee to the abutting legal subdivision or tract out of which it was carved without any express provision to the effect in the instrument of conveyance. Upon abandonment of the easement the dominant estate becomes extinguished and the entire title vests in the owner of the abutting tract. Sherman v. Petroleum Exploration, 280 Ky. 105, 132 S.W.2d 768 (1939); Fitzgerald v. City of Ardmore, 281 F.2d 717 (10th Cir. 1960).

67. Nichols v. Haehn, 187 N.Y.S.2d 773 (Sup. Ct. 1959).

68. State Highway Comm. v. Jacob, 260 S.W.2d 22 (Mo. 1953). Here the deed conveyed a right-of-way for railroad purposes over a strip of land, and provided that upon abandonment the property thus conveyed should revert and be fully vested in the grantors, or his assigns. The court held that the deed conveyed only an easement, and after abandonment relieved the servient estate of its burdon, and did not result in a reversion to the grantor's heirs as remaindermen.

original grantor or his heirs. This distinction should always be carefully observed in the cases involving abandonment.

One circumstance which would appear as a practical matter to be of considerable weight in the determination of the question whether a deed to a railroad company should be construed as conveying a fee or an easement is the amount of consideration. The fact that the railroad company paid consideration equal or nearly equal to the full market value of a fee title in land would thus show an intention that the deed was to pass an estate in fee.[69]

In summary, it is possible to observe that: (a) where the words of conveyance grant "land" (that is, contain language which in the final analysis is stripped of its excessive verbage so often found in real property deeds) which purport to grant a strip, parcel, or belt of land will usually be treated as a fee, (b) those that grant a right, license, right-of-way or other similar rights with the intent to cut down or limit the interest are held to be an "easement" or right-of-way. Where the land so held is classified as an easement, the subsurface minerals belong to the abutting property owner and may be extracted if it does not interfere with the railroad right-of-way and upon the extinguishment of the "easement" the land reverts to the land in which the interest was derived, unless the language of the deed provided for other disposition of the property.

North Dakota has yet to consider this problem.[70]

IV. LAND ACQUIRED BY EMINENT DOMAIN

The right of eminent domain is the paramount dominion of the sovereign over his territory; but whether the power to appropriate private property under the right rests upon an underlying title to the soil or upon the sheer might of the ruler within his function of public service is a debatable point.[71] Whichever theory is followed, it is well settled that land may be appropriated by a railroad under the law of eminent domain for any purpose which has a direct relationship with the construction and maintenance of the railroad.

The quantum or interest of the estate passing to the railroad under condemnation proceedings are either (a) an easement[73] (b)

69. Sherman v. Sherman, 23 S.D. 486, 122 N.W. 439 (1909); Texas & P.R. Ry. v. Martin, 123 Tex. 383, 71 S.W.2d 867 (1934) cert. denied 293 U.S. 598 (1934).

70. In at least one case the Supreme Court determined that a fee simple was conveyed where a warranty deed was given. The deed in question did not attempt to limit or restrict the interest, but in form was absolute. State v. Rosenquist, 78 N.D. 671, 51 N.W.2d 767 (1952). In this connection, where nothing is said to the contrary there is a presumption that fee simple has passed. N.D. Cent. Code § 47-10-13.

71. Kent's Commentaries, 424.

72. Lacy v. Montgomery, 181 Pa. Super. 640, 124 A.2d 492 (1956).

73. Hazek v. Greene, 51 N.J. Super. 545, 144 A.2d 199 (1958).

a fee simple absolute[74] or (c) a qualified fee.[75] A few states have recognized the "base fee" a technical term for the interest denoting an estate having all the characteristics of a fee simple, but determinable by the happening of an event.[76]

The general rule is that only an easement may be so taken unless the taking of a greater estate is expressly authorized by law.[77] Conversely, it is well settled that a fee simple title may be acqured by condemnation if the statute authorizing the taking so provides.[78]

Where a railroad corporation acquires land under eminent domain and the authorizing statutes are silent as to the extent or interest acquired there is a basic field of conflict.[79] The Supreme Court of New Jersey,[80] resolved this conflict by interpreting their constitution to read "private property shall not be taken for public use without just compensation" to mean that the interest so acquired should be no greater than the use in which the taking was granted. The court said there. "This is a recognition of a legislative power to take private property for a public use, but is far from giving authority to take such property for other than public uses. When the state takes the property of its citizens for highway purposes, it acquires an easement only, and it would seem that it is empowered to take only so much of the title as is essential to the public use. To take all the right, title and interest of an owner obviously may be beyond such necessity and be a contradiction in terms of the right to acquire an easement.

To sustain the contention of the commission in this case would open the door to wide and dangerous invasions of private property. A power thus conferred would permit the acquisition of private property for a public use with its ultimate destination intended to be devoted to a private use and foreign to the cause for which it

74. Hamberger v. Hottinger, 14 Misc.2d 839, 180 N.Y.S.2d 197 (1958).

75. Lithgow v. Pearson, 25 Colo. App. 70, 135 Pac. 759 (1913) (This estate seems peculiar to Colorado).

76. Smith v. Hall, 103 95, 72 N.W. 427 (1897); Western Union Teleg. Co. v. Penn. R.R., 195 U.S. 540 (1904); In Reed v. Allegheny County, 330 Pa. 300, 199 Atl. 187 (1938) the court said ". . . defendant obtained title to its roadway by condemnation, such title, while less than a fee, is more than an easement. It is a right to exclusive possession, to fence in, to build over, the whole surface, . . . and to deal with it within the limits of railroad uses, as absolutely and as uncontrolled as an owner in fee. There was no such easement at common law . . . It would seem to be rather a fee in the surface, and so much beneath as may be necessary for support . . .".

77. Hinman v. Barnes, 146 Ohio 497, 66 N.E.2d 911 (1946).

78. Hazek v. Green, 51 N.J.Super. 545, 144 A.2d 199 (1958).

79. "While it has been said that, if there is such a thing as a new title known to the law, one founded on a taking by the right of eminent domain is as clear an example as can be found." Holmes, J. in Emery v. Boston Terminal Co., 178 Mass. 172, 184, 59 N.E. 763, 764 (1901); Quoted with approval in Crouch v. State, 218 App. Div. 356, 218 N.Y. Supp. 173 (1926).

80. Summervill v. Hunt, 136 N.J.Misc. 314, 55 A.2d 833 (1947) construing the New Jersey Const. Art. 1 § 16.

was condemned." The reasoning applied here holds true where the railroad instituted condemnation proceedings and pending the proceedings the railway purchased the interest by deed.[81]

The same analysis is applicable under special charter provisions when a right-of-way is acquired by condemnation, only an easement passes to the railroad. The original owner may then use the land in any manner not inconsistent with the easement. However, such occupancy and use by the owner is subject to the railroad's right to extend its use of the right-of-way to its fullest extent whenever the necessities of business require it.[82]

Where the land sought to be condemned by the railroad is subject to an oil and gas lease, the railroad has no right to drill for oil and gas, but has only the exclusive use of the surface for railroad purposes.[83]

In a recent South Dakota decision,[84] where the statute authorized the railroad to acquire real property for construction, maintenance and operation of the railroad, neither the statute or the constitution limited the degree of interest that could be acquired. The court held that a fee simple rather than an easement was conveyed. The conveyance was in the form of a warranty deed and made no reference to words of limitation, restricting or otherwise limiting the interest of the grantee.

Where the charter or statutes are silent as to any prohibition against taking the lands in fee simple, an easement is usually taken. However, it is not necessary, in order for the railroad company to acquire a fee simple that the charter or statute under which the taking is made expressly declare that it shall do so.[85] Even though the statute authorizes the taking of a fee simple on condemning land for a railroad right of way, the proceedings must clearly show that it was intended that a fee title was to be acquired under the decree.[86]

Where the statute does not authorize a taking in fee but the condemnation proceedings have nevertheless purported to transfer the fee — the judgment will not be deemed wholly invalid but will be

81. Highland Realty Co. v. City of San Rafael, 46 Cal.2d 175, 298 P.2d 15 (1956).
82. Carolina & Northwestern Ry. v. Piedmont Wagon & Mfg. Co., 229 N.C. 695, 51 S.E.2d 301 (1949).
83. Magnolia Petroleum Co. v. St. Louis-San Francisco R.R., 152 P.2d 367 (Okla. 1944) (Held that the railroad right of usage applied only to the surface).
84. Nystrom v. State, 104 N.W.2d 711 (S.D. 1960). Here the land was acquired by purchase, rather then condemnation. The wording and form of the grant are such as to make it clear that the plaintiff's intended to convey and the railroad company to acquire a fee simple.
85. Detroit Edison Co. v. City of Detroit, 332 Mich. 348, 51 N.W.2d 245 (1952).
86. Mo. K. & T. R.R. v. Miley, 263 P.2d 415 (Okla. 1953).

recognized as condeming an easement.[87] Similarly, where the statute authorizes a taking in fee but the constitution provides in effect for the acquiring of an easement, the interest will not be considered totally invalid but will convey the lesser estate.[88]

Today in North Dakota the question is still mute whether through eminent domain a fee or an easement is passed. Although at first impression it would appear that North Dakota[89] would hold that a fee simple is taken, it appears that the form of the conveyance and the intention of the parties would be more controlling, plus the factor of whether or not adequate consideration was given.[90]

The first qualification is that the property thus taken be for a public purpose.[91] If the land so condemned is essential to the railroad for either the construction or maintenance of its business the requirements of a taking for a public purpose are satisfied.[92]

Where the railroad receives the property by voluntary grant, the statute reads ". . . . the real estate received by voluntary grant shall be held and used for the purposes of such grant only."[93] The implication is clear. The railroad takes only an easement for right-of-way or railroad purposes and upon abandonment the easement is extinguished. Since the railroad only acquires the right to the surface it follows that the fee to the underlying minerals would remain in the grantor.[94]

The North Dakota Code also provides for the acquisition of public lands through eminent domain. The right of way through

87. Crouch v. State, 218 App. Div. 356, 218 N.Y.Supp 173 (1926).

88. Scott v. St. Paul & C. R.R., 21 Minn. 322 (1875).

89. Interest has been expressed as to whether Wallentinson v. Williams County, 101 N.W.2d 571 (N.D. 1960) would apply to railroads. There the State condemned land for highway purposes. Subsequently, the former grantor brought an action to quiet title to the oil, gas and minerals underlying the condemned land. The Supreme Court held that prior to 1953 the state through condemnation took a "determinable fee" (really a fee subject to the power of vacation) but that subsequent legislation revested the title to oil and gas in the grantor by operation of law. In effect this decision is applicable only to the state, and their political subdivisions in acquiring property for *highway purposes* under eminent domain.

90. There appears to be an inconsistency between N.D. Cent. Code § 49-08-12(3) and 32-15-03(2). In the former it appears from the wording of the statute that a fee simple is taken from the language ". . . and to sell the same when not required for railroad uses and no longer necessary to its use." On the other hand the latter section in specific terms apparently creates only an easement. This statute reads "An easement when taken for any other use. . . ." This is in reference to the classification of estates and rights in land subject to be taken for public use. It would seem that the estate or interest to be taken when not definitely set forth, would be only such as is reasonably necessary to carry out a public purpose for which the land was taken. See, Wallentinson v. Williams County *supra*, at 575.

91. Northern Pac. Ry. v. Boyton, 17 N.D. 203, 115 N.W. 679 (1908); N.D. Cent. Code § 32-15-01.

92. See, N.D. Cent. Code § 49-08-13(3). (Purpose for which acquired).

93. N.D. Cent. Code § 49-08-13(2).

94. Chicago & N. W. Ry. v. Continental Oil Co., 253 F.2d 468 (10th Cir. 1958). This decision envolved land granted by the United States to the railroads and the same result would probably follow if given by a private grantor.

state land is subject to certain conditions[95] both as to the quantum[96] which the railroad may take and to the duration.[97] If the land which is subject to be taken is university or school lands, the grant ". . . . shall contain an express reservation to the use of such corporation of all lands which it shall have appropriated in accordance with the provisions of this chapter. If such road shall not be completed across any such section within five years after the location . . . . the rights herein granted shall be forfeited as to such section."[98]

When land is actually condemned or by threat of eminent domain, a different situation appears. The North Dakota Century Code § 49-08-12 (3) provides:

> "To acquire by purchase or under the provisions of this chapter on eminent domain, all such real estate and other property as may be necessary for the construction, maintenance and operation of its railroads, and stations, depot grounds, and other accommodations reasonably necessary to accomplish the objects of its incorporation to hold and use the same to *lease* or *otherwise dispose* of any part or parcel thereof, and to *sell* the same when not required for railroad uses and no longer necessary to its use."

It is evident that the legislature intended that a fee simple title should pass to the railroad. The title that is acquired is coextensive and correlative with the power of holding and disposing of the land thus acquired. This was the interpretation that the South Dakota Court reached under an identical statute.[99]

However, the statute does not prohibit the parties in contracting for a lessor estate by deed if they so desire. It would be a strained interpretation indeed if the statute was absolute. Nor did the legislature in its adoption intend to restrict or limit the freedom of contract.[100] In any given case, if land is secured by eminent domain by quite claim or warranty deed without restrictions, limitations, or in any way cutting down or limiting the grant a fee simple should

95. N.D. Cent. Code § 49-09-01.
96. N.D. Cent. Code § 49-09-04.
97. N.D. Cent. Code § 49-09-03. (In effect this confers a determinable fee on a condition subsequent).
98. N.D. Cent. Code § 49-08-12(3).
99. Nystrom v. State, 104 N.W.2d 711 (S.D. 1960). The court held that a fee simple title passed notwithstanding a provision in the Constitution which said: "Private property shall not be taken for public use, or damaged without just compensation as determined by a jury. The fee of land taken for railroad tracts or other highways shall remain in the owners, subject to the use for which it is taken." S.D. Const. Art. 6, § 13. North Dakota's Constitution is silent as to the quantum of the interest conveyed and merely asserts that "Private property shall not be taken or damaged for public use without just compensation. . . ." N.D. Const. Art. 1 § 14.
100. It is not unreasonable to assume that the grantor may give not only an easement, but a determinable fee or any other interest the parties agree upon.

pass. On the other hand if the deed is restrictive in the sense that the deed grants to the railroad only an easement or right-of-way and the consideration is commensurate with the condemned land, the grantee railroad should take only an easement.

Each taking should be scrutinized carefully in light of the applicable statutes and judicial interpretations to determine in any given situation whether the taking is essential to the indispensable use of the railroad.[101]

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THE DUTY OF AN AUTOMOBILE PASSENGER TO EXERCISE CARE

What conduct on the part of a passenger in an automobile constitutes contributory negligence barring a recovery in case of an accident? What affirmative steps must a passenger take for his safety? This paper is an attempt to answer these questions in the light of the changing technology of automotive travel. At the outset a few definitions are in order.

Many states have enacted statutes limiting the liability of a driver of an automobile for injuries to guests to situations involving either gross negligence, willful misconduct, or intoxication.[1] In such jurisdictions a "guest" is defined, for the purpose of applying the statutes, as a person whom the owner or possessor of a motor vehicle invites to ride with him as a gratuity.[2] A "passenger", conversely, is defined as a person conveyed for hire from one place to another, and the relationship between carrier and passenger is contractual.[3]

This latter definition is, for purposes of the present discussion, somewhat too restrictive in character. It has been astutely observed that whatever the technical legal significance of the term "passenger" may be, in common parlance it means an occupant of a motor vehicle other than the person operating it and describes a physical status rather than a technical legal status.[4] Many courts,

101. East Alabama Ry. v. Doe, 114 U.S. 340 (1885); Smith v. Townsend, 148 U.S. 490 (1893); Rose v. Bryant, 251 S.W.2d 860 (Ky. 1952).

1. *E. g.*, N.D. Cent. Code § 39-15. For general discussion of these enactments, see 11 U. Cin. L. Rev. 24 (1937).

2. See Taylor v. Austin, 92 Ga.App. 104, 88 S.E.2d 192 (1955); Allison v. Ely, 159 N.E.2d 717, 722 (Ind. App. 1959).

3. Rocha v. Hulen, 6 Cal.App.2d 245, 44 P.2d 478 (1935); Bentley v. Oldetyme Distillers, 71 N.D. 52, 298 N.W. 417 (1941).

4. Vogrin v. Hedstrom, 220 F.2d 863, 866 (8th Cir. 1955).