FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LEE E. SMITH and ANNA MARIE SMITH,

Plaintiffs-Appellees,

vs.

WOODBURY COUNTY, IOWA and ILLINOIS CENTRAL GULF RAILROAD COMPANY,

Defendants-Appellants.

Filed October 27, 1981

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Appeal from Woodbury District Court - James P. Kelley, Judge.

Defendants appeal from a summary judgment for plaintiffs quieting title to an abandoned railroad right of way. AFFIRMED.

Roger McEntaffer, Sioux City, for defendant-appellant Woodbury County, and Dewie J. Gaul, Sioux City, for defendant-appellant, Illinois Central Gulf Railroad Company.

Randy Hefner, Adel, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Carter, and Johnson, JJ.

DONIELSON, J.

Defendants, Woodbury County and Illinois Central Gulf Railroad Co., appeal from a summary judgment for plaintiffs quieting title to an abandoned railroad right of way. Defendants contend: (1) the railroad held title to the disputed land in fee simple and subsequently transferred that interest to the county; (2) that the deed which conveyed the surrounding farm to the plaintiffs excluded the disputed strip of land; and (3) the plaintiffs were only entitled to rely on the strength of their own title, not the weakness of defendants' title, in this quiet title action.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. We affirm.

I.

Plaintiffs filed suit on June 19, 1980, to quiet title to an abandoned railroad right of way which runs across their farm. The disputed strip of land was originally deeded to the Cherokee and Dakota Railroad Company in 1888 by William H. Dewey, who at that date also owned the surrounding farm land. In 1892, Dewey deeded the surrounding farm land to Henry Gulliford, but excepted the railroad right of way. Defendant's trace their title back to the 1888 deed and allege that it granted the railroad a fee simple in the disputed strip of land. Plaintiffs trace their title back to the 1892 deed and allege that the 1888 deed was only intended to grant an easement to the railroad. Plaintiffs claim the exception of the right of way in their chain of title does not except their right to the underlying land itself now that the railroad has abandoned use of the right of way. Defendants, however, claim the exception means that plaintiffs never had any right to the disputed strip of land.

II.

Defendants' first contend that the 1888 deed granted the Cherokee and Dakota Railroad Company title to the disputed land in fee simple. We disagree and find that the trial court was correct in deciding this case in a manner consistent with Johnson v. Burlington Northern, Inc., 294 N.W.2d 63 (Iowa App. 1980). Defendants correctly point out that the language of the 1888 deed does not limit usage of the land to only railroad purposes as in Johnson, but this fact is not determinative. The deed in the instant case is similar to the deed in Keokuk County v. Reinier, 227 Iowa 499, 503, 288 N.W. 676, 678 (1940), where the court held that language stating "to have and hold for all purposes incident and necessary to the construction and operation of a railroad and telegraph line or lines thereon," merely conveyed a right of way, not a fee simple estate. The

language in the 1888 deed to the railroad is nearly identical to the language quoted above. The habendum clause states: "To have and to hold to said company, its successors and assigns, forever, the aforementioned strip of land, for all purposes connected with the construction, maintenance and operation of a steam railroad over the same . . ." We find this language limits the grant of land to use for railroad purposes as in Keokuk County v. Reinier, and thereby creates only an easement.

Defendants further argue that the habendum clause is repugnant to the granting clause and should not be given effect. However, we ". . . construe the whole instrument without reference to the formal divisions in order to effectuate, if possible, the grantor's intent." In re Estate of Fleck, 261 Iowa 434, 440, 154 N.W.2d 865, 868 (1967). We believe that when the granting clause and habendum are construed together it is clear that the intent of the 1888 deed was to grant only an easement. This finding is further supported by the fact that the 1888 deed was labeled a "right of way deed."

III.

Defendants contend that due to the language of the 1892 deed, which excepts the railroad right of way from the grant to plaintiff's predecessors, plaintiffs have no interest in the disputed strip of property. We disagree and find that plaintiffs are correct in asserting the exception only applied to the right of way, not the underlying real estate upon which the right of way was located.[1] Under this interpretation, plaintiffs have always been owners of the disputed strip in fee simple, but their ownership was subject to the railroad's right of way easement. When use of the right of way was abandoned, plaintiffs' title to the underlying property was no longer encumbered by the railroad easement. Plaintiffs, therefore, had title to the land sufficient to quiet title and did not rely upon perceived weaknesses of defendants' title.

Having examined all of defendants' allegations, we find that the trial court was correct in granting plaintiffs' motion for summary judgment.

AFFIRMED.

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1 The instant case is distinguishable from prior cases where the exception specifically referred to the underlying realty rather than just the right of way. Cf. Hall v. Wabash R. Co., 133 Iowa 714, 110 N.W. 1039 (1907), Spencer v. Wabash R. Co., 132 Iowa 129, 109 N.W. 453 (1906), Atkin v. Westfall, 246 Iowa 822, 69 N.W.2d 523 (1955).