FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LYNN JENSON,

Plaintiff-Appellant,

vs.

BURLINGTON NORTHERN, INC., and DALE ASPEDON,

Defendants-Appellees.

Filed February 5, 1980

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2-62930

Appeal from Fremont District Court - Paul H. Sulhoff, Judge.

Plaintiff appeals from dismissal of his action seeking conveyance to him of abandoned railroad right-of-way. - Affirmed.

John H. Greve, Northwood, for plaintiff-appellant.

Michael O. Johanns, of Peterson, Bowman & Johanns, Lincoln, Nebraska, and Karen Chaney, Glenwood, for defendant-appellee Burlington Northern, Inc.

Howard B. Wenger, Hamburg, for defendant-appellee Dale Aspedon.

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

PER CURIAM

Plaintiff appeals from the dismissal of his action seeking to compel defendant-railroad to convey an abandoned right-of-way to him. We affirm.

Plaintiff bases his claim for conveyance of the abandoned right-of-way on a document entitled "Grant of Easement," which was executed by the railroad in favor of plaintiff's predecessors' interest in the land adjoining the right-of-way. The "easement" interest was described by the following language:

> Now Therefore, the said Chicago, Burlington & Quincy Railroad, in consideration of the sum of $750.00 in hand paid, the receipt whereof is hereby acknowledged, does hereby grant to the said Earl Murphy and Brice L. Hays of Mills County, Iowa, their grantees, successors and assigns, a right of permanent easement upon said right-of-way and the lands above described, as are being used for dikes or borrow pits, to go upon the same to repair, widen, strengthen or increase the elevation of any dike or levee erected thereon, for the purpose of protecting the grantor's railroad, or their successors, or the lands of the grantees, or their successors, from overflow and damage from the waters of the East Nishna Botna River.

It is apparent from the language of this provision that the railroad intended to grant an appurtenant easement. See Sherwood v. Greater Mammoth Vein Coal Co., 193 Iowa 365, 374, 185 N.W. 279, 283 (1921); Karmuller v. Kratz, 18 Iowa 352, 356-60 (1865).

The controversy in this case, however, arises over a different provision in the "Grant of Easement." That provision provided:

> Further in consideration of said payment of $750.00, the grantor covenants and agrees that in the event the right-of-way above described shall be permanently abandoned for railroad purposes, either by the grantor or its successors, that the said grantor or its successors will convey to the grantees, or their successors or assigns whatever interest, if any, they may have in the real estate particularly above described, together with all interest, if any, they may have in the right-of-way situated to the East thereof and immediately adjacent thereto.

Plaintiff contends that this provision creates an appurtenant easement in the form of the railroad right-of-way. While it is true that a railroad right-of-way is in fact an easement, Clark v. Wabash Railroad Co., 132 Iowa 11, 13, 109 N.W. 309, 310 (1906), the above provision must be more appropriately termed an affirmative covenant by the railroad to convey the right-of-way to the grantees or their successors or assigns upon

abandonment of the right-of-way for railroad purposes. Furthermore, we conclude that the benefit of this covenant ran with the land, so that the necessity to make specific mention of the covenant in successive conveyances was unnecessary. See Sexauer v. Wilson, 136 Iowa 357, 362-64, 113 N.W. 941, 943-44 (1907); Restatement of Property, §§ 542-44, 547 (1944). Thus, plaintiff had the right to enforce the benefit of the covenant at law. However, we conclude that he failed to do so within ten years after the breach of the covenant, and thus his action was barred by the statute of limitations. § 614.1(5), The Code 1977.

As the above-quoted provision states, the grantor covenanted to convey the right-of-way to the grantees or their successors or assigns when the right-of-way was permanently abandoned for railroad purposes. The failure to convey at the time of abandonment would constitute a breach of the covenant. Thus, the question of when the covenant was breached turns on the question of when the right-of-way was permanently abandoned for railroad purposes.

Abandonment of a railroad right-of-way merely means that use of the right-of-way for railroad purposes has permanently ceased. McClain v. Chicago, Rock Island & Pacific Railway Co., 90 Iowa 646, 649, 57 N.W. 594, 595 (1894). A showing of actual acts of relinquishment accompanied by an intention to abandon is required to establish abandonment of property. Pearson v. City of Guttenburg, 245 N.W.2d 519, 529 (Iowa 1976) (quoting Sioux City v. Johnson, 165 N.W.2d 762, 767 (Iowa 1969)). In the case at bar, the defendant-railroad applied for and was granted formal permission by the Interstate Commerce Commission to abandon the right-of-way in question in 1961. This established the intention to abandon. By 1965, all railroad tracks and ties were removed from the right-of-way. This established the actual act of relinquishment conclusive of abandonment. Atkin v. Westfall, 246 Iowa 822, 827, 69 N.W.2d 523, 526 (1955).

Thus, the railroad was abandoned in 1965, and the railroad's failure to convey the right-of-way to the successors of the grant of easement grantees at that time constituted a breach of the covenant to convey contained in the grant of easement giving rise to the cause of action commenced by plaintiff. However, plaintiff did not commence his action until 1977, and thus was not within the ten-year limitations period of section 614.1(5), The Code 1977. Consequently, plaintiff's action was barred by the

statute of limitations.

We hold that plaintiff's action seeking to compel conveyance of the railroad right-of-way was appropriately dismissed by the trial court as barred by the statute of limitations. In so holding, we do not address defendant's claim that the action was also barred by the stale use statute, section 614.24, The Code 1977.

AFFIRMED.