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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

WILLIAM M. GIBBONS, TRUSTEE OF THE ESTATE OF THE CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AS TRUSTEE AND NOT INDIVIDUALLY,

Plaintiff-Appellee,

vs.

ROBERT F. KAUFMANN,

Defendant-Appellant.

Filed August 26, 1980

0-217
2-64322

Appeal from Muscatine District Court - R. K. Stohr, Judge.

Defendant appeals judgment for plaintiff in his action for forcible entry and detainer based on nonpayment of rent. AFFIRMED.

John C. Fishburn and Jerome W. Conway of Muscatine, Iowa, for defendant-appellant.

Victor C. Rabinowitz of Gamble, Riepe, Burt, Webster and Davis, Des Moines, Iowa, for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

This is an appeal from judgment for plaintiff (as trustee of the estate of the Chicago, Rock Island and Pacific Railroad Co.) in his action for forcible entry and detainer based on defendant's nonpayment of rent. Defendant claims title to the strip of land in question under the railroad abandonment statute, section 327G.77, The Code 1979. Our review is **de novo**. Section 648.5, The Code; Iowa R. App. P. 4. We affirm.

I. In 1944 defendant's parents gave a quit claim deed to former railroad trustees of a certain 100-foot strip of land. The deed purported to convey "all our right, title and interest." Following the granting clause, the deed stated: "Grantors reserve the right that if said railroad right of way is every [sic] abandoned it shall revert to Grantors or their assigns" (emphasis added). Defendant is the assignee of grantors' rights, including those rights under a 1939 lease of the disputed land given by the railroad to defendant's father. Defendant stopped making rent payments under the lease in February, 1979. Plaintiff instituted this equity action of forcible entry and detainer for nonpayment of rent. Defendant's answer contested plaintiff's title to the disputed strip, claiming the land reverted to defendant under the 1944 deed when its use for railway purposes ceased sometime during the 1960's. Defendant later filed an amended answer claiming the 1944 deed only granted an easement for railway purposes and not a determinable fee with a possibility of reverter. The trial court ruled that the 1944 deed conveyed a fee simple determinable with a possibility of reverter and that, since defendant did not preserve his rights under the reverter clause by filing a verified claim on time, his rights were extinguished by reason of section 614.24, The Code.

II. The critical issue here is the effect of the language of the 1944 deed. If the deed created a mere right of way, defendant would prevail under section 327G.77, The Code 1979, which provides in relevant part as follows: "If a railway, or any part thereof, shall not be used or operated for a period of eight years . . . the right of way, including the roadbed, shall revert to the persons who, at the time of the reversion, are owners of the tract from which such right of way was taken."

However, the deed in question does more than grant a right of way; grantors in the granting clause conveyed to the railroad "all our right, title and interest." There is no language which limits the grant in any manner except for the reverter clause.

A number of Iowa cases have considered the question of whether granting language in a deed conveys a fee or an easement. Easements were found in Barlow v.

Chicago, Rock Island and Pacific Railroad Co., 29 Iowa 276 (1870) (deed conveyed to the railroad "the following piece or tract of land . . . for the construction of the second division of said railroad"); Keokuk County v. Reinier, 227 Iowa 499, 288 N.W. 676 (1939) (deed conveyed strips of land "for all purposes incident and necessary to the construction and operation of a railroad and telegraph line or lines thereon") and Atkin v. Westfall, 246 Iowa 822, 69 N.W.2d 523 (1955) (deed to railroad "to have, hold and enjoy . . . for any and all uses and purposes in any way connected with the construction, operation, preservation, occupation and improvement of the said Railway"). We recently decided a similar issue in Johnson v. Burlington Northern Ry. Co., 294 N.W.2d 63 (Iowa Ct. App. 1980). That case presented a deed wherein certain property was conveyed to a railroad "for said railroad and for railroad purposes only." Because of the limiting nature of the granting language, we held the deed created only an easement for railroad purposes.

The deed in the present case, in contrast to the foregoing cases, lacks specific language in the granting clause itself which limits the conveyances to the railroad companies for railway purposes only. This case more closely resembles Des Moines City Railway Co. v. City of Des Moines, 183 Iowa 1261, 159 N.W. 450 (1918). In that case various deeds to the Des Moines Transit Co. conveyed "all our interest" or "all our right, title and interest, estate, claim and demand." Each deed also provided that the conveyed strips of land were to be used for the construction and operation of a street railway thereon and "in the event of the abandonment of the use . . . for street railway purposes it shall revert to the grantors." The court held the deeds created determinable fees and not merely easements. See also Jacobs v. Miller, 253 Iowa 213, 111 N.W.2d 673 (1961). Similarly in this case, the granting clause conveys all of grantors' "right, title and interest" with no reference to an easement or right of way.

Defendant argues the reference in the reverter clause to the "right of way" indicates an intent on grantors' part to so limit the conveyance. We disagree. The granting clause, which is the critical language of the conveyance, is not so limited in its wording. The reference made to "right of way" has to do with the circumstances upon which the grant becomes determinable. As such we attribute to this language a generic description of land occupied by a railroad for its tracks rather than a description of the specific estate created.

The trial court was correct in concluding the 1944 deed created a determinable fee with a possibility of reverter instead of an easement or right of way.

III. Since a determinable fee was created, defendant's argument for a reversion under section 327G.77, The Code, is without merit, for that statute applies only to a right of way. "We have held chapter 473, Code of Iowa, 1958 [now numbered §§ 327G.76, 327G.77, The Code 1979], applicable to cases where the railroad acquired the land by condemnation or by deed conveying only a right of way for railroad purposes . . . and inapplicable to cases where the railroad acquired the right of way in fee simple." Jacobs v. Miller, 253 Iowa at 216 (citations omitted).

IV. The enforceability of defendant's reversionary interest is determined by section 614.24, The Code, the Stale Uses and Reversions Act.[1] That statute reads in relevant part as follows:

> No action based upon any claim arising or existing by reason of the provisions of any deed or conveyance or contract or will reserving or providing for any reversion, reverted interests or use restrictions in and to the land described shall be maintained . . . against the holder of record title to such real estate in possession after twenty-one years from the recording of such deed of conveyance . . . unless the claimant shall . . . file a verified claim with the recorder of the county wherein said real estate is located within said twenty-one year period.

Here, the deed creating the reversion now claimed by defendant was recorded on December 1, 1944. To preserve his interest, defendant had to file his claim by December 1, 1965. He did not file such claim until December 1, 1977—twelve years too late. Defendant's reversionary interest is clearly extinguished by section 614.24.

Defendant finally argues his interest is preserved under section 614.36, The Code, making section 614.24 inapplicable. We disagree. Section 614.36 reads as follows:

> This division shall not be applied . . . to bar or extinguish any easement or interest in the nature of an easement, the existence of which is apparent from or can be proved by physical evidence of its use.

Initially, it is debatable whether this section has any connection with section 614.24 at all. The section makes inapplicable "this division"; the division referred to which

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[1] Section 614.24 was amended on May 26, 1980 by Senate File 2230, 68th General Assembly, effective July 1, 1980, by adding the following new paragraph:

> The provisions of this section requiring the filing of a verified claim shall not apply to the reversion of railroad property if the reversion is caused by the property being abandoned for railway purposes and the abandonment occurs after the effective date of this Act. The holder of such a reversionary interest may bring an action based upon the interest regardless of whether a verified claim has been filed under this section at any time after July 4, 1965. (emphasis added)

1980 Iowa Legis. Serv. at 851. Since the effective date of this new act in July 1, 1980, § 3.7, The Code, it does not help defendant in this case.

section 614.36 modifies is the Marketable Record Title Act, sections 614.29-614.38, The Code, of which section 614.24 is not a part. Even if section 614.36 was relevant, it would not help defendant because, as determined above, the 1944 deed created a determinable fee with a possibility of reverter and not an easement or an "interest in the nature of an easement." Since it cannot be denied defendant failed to comply with the filing requirements of section 614.24, his reversion is extinguished. See Chicago & North Western Railway Co. v. City of Osage, 176 N.W.2d 788 (Iowa 1970). Thus, defendant cannot object to plaintiff-trustee's title to the disputed strip of land. The trial court was correct in ruling defendant liable for nonpayment of rent under the lease.

AFFIRMED.