

Real Property

Railroad Corridor - Right of Way - Fee Simple Determinable - Marketable Title Act

Where the plaintiffs' predecessors granted a railroad company a "right of way in, over and upon" a parcel of land for so long as it was used for railroad purposes, the railroad company received a fee simple determinable, but the plaintiffs' future interest was extinguished by the Marketable Title Act.

Judgment for the defendant affirmed.

In *McCotter v. Barnes*, 247 N.C. 480, 101 S.E.2d 330 (1958), our Supreme Court said, "The term 'right of way' has a two-fold meaning: it may be used to designate an easement, and, apart from that, it may be used as descriptive of the use or purpose to which a strip of land is put. It is a matter of common knowledge that the strip of land over which railroad tracks run is often referred to as the 'right of way,' with the term being employed as merely descriptive of the purpose for which the property is used, without reference to the quality of the estate or interest the railroad company may have in the strip of land."

An 1856 deed granted to the Wilmington, Charlotte and Rutherford Railroad Company a right of way *in, over and upon* any land or lands owned by the grantor. The habendum clause states, "TO HAVE TO HOLD, all and singular the aforesaid lands, rights and privileges to said Wilmington, Charlotte and Rutherford Railroad Company, and its successors forever." The habendum clause indicates that the interest granted was more than a right or privilege of entry.

The term "right of way" can be harmonized with the other clauses of the deed referring to a parcel of land. Thus, following the reasoning of *McCotter*, the term appears to describe the use of the land and not the nature of the property interest granted. Accordingly, the trial court correctly determined that the deed to the Wilmington, Charlotte and Rutherford Railroad Company granted a fee simple and not merely an easement.

The conditional language "so long as" restricting the use of the land for railroad purposes is sufficient to create a fee simple determinable with the grantor retaining a possibility of reverter. The trial court found that the grantors retained the possibility of reverter according to this language but

that this future interest was extinguished under the Real Property Marketable Title Act.

Under the Act, the plaintiffs were required to file notice of their property interest prior to Oct. 1, 1976. The plaintiffs failed to file by this date. Thus, the trial court correctly concluded that the plaintiffs' future interest was extinguished under the Act.

Affirmed.

King Associates, LLP v. Bechtler Development Corp. (Lawyers Weekly No. 06-07-0869, 12 pp.) (Rick Elmore, J.) Appealed from Rutherford County Superior Court. (E. Penn Dameron Jr. & Laura J. Bridges, JJ.) N.C. App.

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