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TITLE TO ABANDONED RAILROAD RIGHTS OF WAY*

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There are many reasons for abandoning a railroad right of way. Abandonment may result from railroad consolidations, from re-surveys and relocations of railroads or because of bus and truck lines being used in place of railroads particularly the short haul railroads. So far as Western railroads are concerned, many of these abandoned ways have been occasioned by changes from a narrow gauge road to a broad gauge road. Much information is available from the many books that have been written on the early history of railroading and the subsequent growth and changes in the industry. Judge William S. Jackson, a former Justice of the Colorado Supreme Court, has written a most interesting and informative history on "Railroad Conflicts" in Colorado. Lucius Beebe has written his "Pageant of Trains" and his book on "Short-Line Railroads"—both profusely illustrated. Gilbert A. Lathrop has written his famous book entitled "Little Engines and Big Men." It has been said that among the early railroads of America none has left so rich a heritage of romance, excitement and glamour as have the narrow gauges. Even penetrating into the very heart of the Rockies these diminutive carriers represented life itself to those who lived upon the right of way.

* * *

Our subject concerns a comparatively simple statement of fact. An owner conveys a strip or tract of land to a railroad company which it uses as a right of way. Thereafter, such use is abandoned but the company nevertheless claims ownership of the strip. The grantor to the railroad also claims title. We are involved with a construction of the deed. Is it a conveyance in fee simple or does it convey an easement?

It would seem an easy matter to construe a deed. If the deed purports to convey a fee simple title then that is exactly what the railroad acquires. If the deed purports to convey a right of way then upon abandonment the easement ceases to exist and the grantor retains a title in fee.

In many instances, however, the courts have had to depend upon considerations other than a granting clause referring to "land" or a granting clause referring to a "right" or an easement. Frequently, the deed contains language which is not a plain reference to land or to a right. A standard form of warranty deed may mention a "right of way" or mention some proposed use of the land. A deed in a form to convey a fee simple estate may be captioned "Right of Way" deed. Confusion arises because of the lack of uniformity in such references and different interpretations are contained in the decisions. There is considerable conflict of authority as to the effect of such added provisions.

Occasionally a railroad company owning acreage will itself convey, with the reservation of a strip retained for railroad purposes. Since the same rules apply, we will concern ourselves with deeds *to* a railroad company.

The decisions fall into several categories and we will present a few typical cases in each category.

As an example of a conveyance illustrating a clear purpose to convey a *fee simple title* we cite the following case:

> A deed conveying to a railroad company "so much of the southwest quarter of the southeast quarter . . . as lies within fifty feet of

*Delivered before the American Bar Association, Section of Real Estate, Probate and Trust Law, 1957 Regional Meeting, May, 1957.

the center line of the main track" of the road was held in Watkins v. Iowa C. R. Co., 123 Iowa 390, 98 N. W. 910, to convey a fee simple title, the court pointing out that there was no showing in the deed that the land was for a right of way or was to be used for railroad purposes. See also, Radetsky v. Jorgensen, 70 Colo. 423, and Switzer v. Board of Co. Commrs., 70 Colo. 563.

As illustrating a clear purpose to convey an easement, we cite the following example:

> A deed to a railroad company providing that the grantors "grant, bargain and sell and convey unto the said (company), its successors and assigns forever, a strip of ground fifty (50) feet in width for right of way of said railroad, *over* and *across* the following described tract of tract of land" was construed in Kansas City S. R. Co. v. Sandlin, 173 Mo. App. 384, 158 S. W. 857, to pass an easement and not a title in fee.

The following cases construe deeds which contained references to a right of way or to the purpose of the conveyance or to the proposed use of the land:

A deed conveying to a railroad company, "its successors and assigns a strip, tract of parcel of land for a railroad right of way" described as

> "100 ft. in width, being 50 ft. on each side of the center line of the railroad as surveyed," and containing a habendum clause providing: "To have and to hold said strip or parcel of land, together with all appurtenances thereunto belonging, unto the (grantee) . . . its successors and assigns forever, with covenant of general warranty of title" was held in Sherman v. Petroleum Exploration Co., et al., 280 Ky. 105, 132 S. W. 2d 768, to grant a mere easement rather than a fee simple title the court expressing the opinion that the words "for railroad right of way" could not be rejected as surplusage, but on the contrary, operated to show that the parties intended to convey only an easement. It was further held that if the habendum clause in the deed in question should be considered sufficient to embrace a fee with a covenant of general warranty, it could not, under the general rule that the habendum clause of a deed must yield to the granting clause, be allowed to control the granting clause; but the further view was expressed that there was in reality no conflict between the two clauses, since the habendum clause might be interpreted as warranting the title to an easement which was granted in perpetuity.

State ex rel State Highway Commission v. Griffith, 342 Mo. 229, 114 S. W. 2d 976, involved the construction of a general warranty deed providing that the grantors "grant, bargain and sell, convey and confirm, unto the said (railway company), its heirs, and assigns, the following described lots, tracts or parcels of land lying, being and situate in the County of Clay and State of Missouri, to-wit: *As and for a right of way for said railway,*" and containing a description of the property conveyed and a habendum clause providing: "to have and to hold the premises aforesaid . . . under the said party of the second part and unto its heirs and assigns forever," the court indicated that the conveyance in question passed an easement and not a fee.

In Keokuk County v. Reinier, 227 Iowa 499, 288 N. W. 676, which involved the construction of a deed to a railway company conveying a strip of land 100 feet wide through a designated 40 acres owned by the grantor, and providing: "The said strip of land being 50 feet on each side of the center line of said railroad as now located by said Company to have and to hold said strip of land for all purposes incident and necessary to the construction and operation of a railroad," the court said: "The deed in the case before us is not a straight fee simple conveyance, but the strip of land was conveyed to the railroad company, 'to have and to hold for all purposes incident and necessary to the construction and operation of a railroad and telegraph line or

lines thereon.' The grant was limited to a specific purpose, and that purpose having been abandoned, all right, title and interest of the railroad in and to the land was thereby divested. It is our holding that the deed conveyed nothing greater than a right of way across the 40 acres for the purpose specified in the deed."

In the case of Swan v. O'Leary, 225 P. 2d 199 (Washington, 1950), paragraph 2 of the syllabus reads as follows:

"Where deed conveyed to railroad company right of way for construction of railroad in and over a particular piece of land, deed passed an easement only and when right of way was abandoned by removal of rails, right of way reverted to successors of original grantors."

A portion of the opinion is as follows:

"The courts have found no difficulty with those conveyances where a grantor, by appropriate words of conveyance, unqualifiedly conveyed a strip of land to a grantee by the usual form of conveyance; nor have they found any difficulty with those where a properly described right of way or easement over a designated tract of land was set forth in the instrument of conveyance. The difficulty arises when the instrument of conveyance is ambiguous, is in some way qualified, or appears to be a mixture of the two ideas. The deed before us is a hybrid. In one instance there is conveyed a strip of land fifty feet in width for the purpose of a railroad right of way. In the second instance, there is conveyed a right of way of the same width. According to some authority the deed conveyed a strip of land in fee simple, but for a special and restricted purpose, and also a right of way of the same width over another tract of land. It seems inconceivable that the parties having in mind the use of the strips of land for the same purpose, would convey a fee simple title to one, but in the case of the other a right of way only."

A dissenting opinion was filed which stated that:

"The use of the words 'for the purpose of a Railroad right-of-way' is merely a declaration of the purpose of the conveyance and does not operate to limit the grant. Quinn v. Pere Marquette Ry. Co., 256 Mich. 143, 239 N. W. 376."

Now follow several cases which held under circumstances similar to the easement cases that a fee simple title was acquired:

A warranty deed by which the grantors sold and conveyed to a railroad company *"to be used for railroad purposes only,* a parcel of land 100 ft. in width, lying 50 ft. on each side of the center line of the (railroad), as located and established upon and across the lands of said (grantor)," was in Quinn v. Pere Marquette R. Co., 256 Mich. 143, 239 N. W. 376, construed to convey a fee rather than an easement, the court saying: "Where the grant is not of the land, but is merely of the use or of the right of way, or in some cases, of the land specifically for a right of way, it is held to convey an easement only. (Citing cases) Where the land itself is conveyed, although for railroad purposes only, without specific designation of a right of way, the conveyance is in fee and not of an easement."

From the case of Bouche et ux v. Wagner et ux, 239 P. 2d 203, (Calif., 1956) we quote as follows:

"The plaintiffs rely upon the following words, found in the conveyance of November 7, 1921, as restricting the conveyance to an easement only:

'As a part of the consideration for this conveyance the grantee agrees to provide such reasonable crossings over and under the railroad right of way herein conveyed to it as may be necessary for convenient use (of grantors' adjoining land).'

"The courts, however, seem to express a divergence of opinion when the conveyance merely has a reference to the use or purpose to which the land is to be put, and which is

contained in either the granting or habendum clause, and, except for the reference, would uniformly be construed as passing title in fee. This confusion, we think, arises for the most part in the failure to distinguish the twofold meaning of the words 'right of way.'

"Let us now consider the conveyance of the strip in Section 7 conveyed to the Silverton Lumber Company. The conveyance is not entitled (1) a 'right of way deed'; (2) the granting clause conveys land, not a right; (3) the consideration was substantial ($650); (4) there is no reverter provided for; (5) the words 'over and across the lands of the grantors' do not appear; and (6) the land conveyed is described with precision. The only indication that the parties may have intended an easement should pass is the incidental reference to a 'right of way' in the covenant following the granting and habendum clause. Thus the term 'right of way' as used in the deed could have referred to either the right of passage or to the land itself. There is nothing therein which in anywise limits the company in the use it might make of the land, and in every other particular the conveyance clearly states the conveyance of the fee."

The court held that a fee simple title was acquired by the conveyance in question.

From the case of Texas Electric Ry. Co. et al. v. Neale et al., 252 S. W. 2d 451 (Texas, 1952) we quote the following:

"Where granting clause in deed conveyed described property, and concluding paragraph of deed recited 'this deed is made as a right of way deed,' quoted words did not have the effect of reducing to an easement fee title conveyed by granting clause.

"The declaration in a deed of the purpose for which land is conveyed or the use to be made of it does not impose a condition upon the title granted; nor does it operate to limit the grant to a mere easement.

"Where deed by its terms plainly and clearly disclosed intention of party to grant and convey title to the land and not merely an easement over it, extrinsic evidence will not be considered to ascertain the intention."

We conclude from the above cases and many others that if the purpose is to convey a fee the deed should be in the form that ordinarily conveys a fee simple title and no mention of any purpose should be contained in the deed. If it is intended to convey an easement there should be a clear statement to that effect without qualification and the habendum clause should not conflict with the granting clause.

Statutes

Statutes, in a few instances, have been held to control irrespective of the language in the deed. A statute may prohibit a railroad from acquiring anything but an easement for its right of way; or the statute may require all rights of way to be held in fee simple.

Thus, upon the ground that the law itself incorporated into the deed in question those conditions and restrictions which the railroad's charter contemplated should govern, and limited the uses to which the land granted should be applied, a general warranty deed which purported to convey in fee without any conditions or restrictions, land which was acquired for a right of way was held, in Chouteau v. Missouri P. R. Co., 122 Mo. 375, 22 S. W. 458 (affirmed in 122 Mo. 390, 30 S. W. 299) to pass only an easement and not the fee, the statute incorporating the grantee limiting its power with respect to the ownership of land to the holding thereof "for the purposes of constructing, maintaining and operating a railroad."

Also, where one section of a statute under which a railroad company was organized authorized it to receive from persons land necessary for the construction or location of its road and another section provided that "when said company shall have procured the right of way as hereinbefore provided, it

shall be seized in fee simple of the right to said land, and shall have the sole use and occupation of the same," it was held in Cincinnati, R. & F. W. R. Co. v. Cleveland, C. C. & St. L. R. Co., 188 Ind. 230, 123 N. E. 1, that a deed conveying a right of way to the company in question must be construed as giving the latter a fee simple title to the land conveyed.

There are also other but dissimilar statutes which can be used in construing a right of way deed. In considering the deep involved in Carr v. Miller, 105 Neb. 623, 181 N. W. 557, the court cited the Nebraska statute which provides that "Every conveyance of real estate shall pass all the interest of the grantor therein unless a contrary interest can reasonably be inferred from the terms used." The conveyance there was to a Railroad "for terminal and railway purposes and uses." It was held that these words did not limit the estate conveyed—or operate as an implied reversion in case the lands conveyed were devoted to a different use.

In a recent case (1952) the Oklahoma Supreme Court considered their statute (Aubert v. St. Louis-San Francisco Ry. Co., 251 P. 2d 191). In this case the granting clause in a warranty deed made by landowner to a railroad company, granted to the railroad company "the right of way for a railroad, telegraph and telephone line over, through and across the lands claimed by the undersigned as grantor; and the court held that the railroad company acquired only an easement and reversed the lower court. The majority opinion commented on the statute as follows:

"We find nothing in the deed which enlarges the grant from a right of way grant to a fee simple. It is true, as contended by defendants, that our statute, 16 O. S. 1951, Section 29, provided that every estate in land which shall be granted or conveyed by a deed shall be deemed an estate in fee simple, unless limited by express words . . . The statute is not controlling."

The minority opinion was concerned entirely with the Oklahoma statute. It stated that:

"There are no express words of limitation upon the grant contained in the deed, so under Title 16 O. S. 1951, Sec. 29, the estate conveyed is deemed an estate in fee simple."

The decision seems to overrule two former decisions of the Oklahoma Supreme Court. All nine judges participated in the case with four of the judges dissenting.

The United States Court of Appeals for the Tenth Circuit followed the Aubert case holding that a deed which conveyed to a railroad company "a right of way for its railroad, telegraph and telephone lines" conveyed an easement and not a fee simple title. The right of way in question was located in Beckham County, Oklahoma, and the court applied Oklahoma law. The court cited the Aubert case and the Oklahoma statute but held that if the deed shows an intent of the grantor to limit the estate conveyed, the intent controls notwithstanding the statute. The court held that the Aubert decision disposed of the case. Chicago Rock Island and Pac. Railroad Company v. Blackmon, et al., 229 F. 2d 803 (1956).

In the case of Mississippi Cent. R. Co. v. Ratcliff, 59 So. 2d 311 (Mississippi, 1952), there were seven sets of descriptions each concluding with the words

"The above described tract or right of way containing———acres, more or less,"

We quote further from the opinion:

"The original deed introduced in evidence bore the following endorsement on the back thereof in unidentified handwriting: 'C. N. Ratcliff et ux to Natchez & Eastern R. R.—Deeds to Rights of Way.' Attached was a sheet which appears to have been a part of the voucher issued for the purchase money and on which was typed by some unidentified person the following: 'C. N. Ratcliff & wife to Natchez and Eastern Ry. Co.—right of way.'

"It is the contention of the appellant that the deed conveyed an estate in fee simple and that the chancellor erred in construing the

deed to convey only an easement or right of way. We concur in this contention. Section 2435 of the Mississipppi Code of 1892, which was re-enacted as Section 2764 of the Mississippi Code of 1906, and successively re-enacted in our subsequent Codes, provides as follows: 'Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby.

"The deed is in the usual form of a general warranty deed. Its granting clause conforms to the form of conveyance prescribed by Section 2816 of the Mississippi Code of 1906 in effect at the time the deed was executed, and in plain and unambiguous language conveys an estate in fee simple.

"Appellee further argues that the endorsement of the words 'deed to rights of way' on the back of the deed, and the typed notation 'right of way' on the voucher sheet, manifests a clear intention to convey a right of way only. We do not think so. It is not shown by whom these notations were made, whether by the recording clerk or some clerical employee.

"The mere fact that a deed may be entitled 'Right of Way,' or, that the term 'right of way' is employed in a recital clause, is not sufficient to convert the absolute fee conveyed by the granting clause into an easement. In 74 C. J. S., Railroads, Section 84, page 475, it is said: 'If the conveyance is in the form of a general warranty deed, or otherwise shows an intention to convey a fee-simple title, it will be so construed, although the instrument is entitled 'deed of right of way,' or employs the term 'right of way,' in describing the property conveyed, or states that the conveyance is for railroad purposes only."

The court held that a fee simple estate was acquired.

Contrast the above quotation from C. J. S. to the following taken from the court's opinion in State ex rel State Highway Commission v. Griffith (1938) supra, page 4.

"We think it sufficient to say that the great weight of authority is to the effect that a conveyance of land to a railroad company for right-of-way purposes only, irrespective of the consideration passes an easement only, and that when such use ceases, the land reverts to the grantor or his heirs. We think that the right-of-way deeds involved in the present cause should be construed to mean for right-of-way purposes 'only.' It is true that the word 'only' does not appear, but if all-purpose use was in contemplation, then why insert the language 'for right of way for said railroad'?"

Incidentally, Colorado has a somewhat similar statute which reads as follows:

"118-1-7. Estate granted deemed fee simple unless limited.—Every estate in lands which shall be granted, conveyed or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to be granted, devised or conveyed by operation of law. Revised Statutes, 1953. (1868)"

This statute, however, has not been used in connection with a railroad right of way case in Colorado.

There is still another type of statute. We refer to one that makes a land grant to a railroad by way of assistance or subsidy. Undoubtedly an outstanding example of such a statute is the Congressional Act of July 1, 1862, under which the Union Pacific Railroad Company, under Section 2 of the Act, was given a right of way "for the construction of said railroad and telegraph line" and under Section 3 of the Act was given every alternate section of public land on each side of the railroad.

It is remarkable that as late as April of 1957, the United States Supreme Court decided a case which concerned this 1862 right of way. We refer to the case of United States of America v. Union Pacific Railroad Company, 1 Lawyers Ed. 2d 693. The court, in reversing decisions of the United States District Court and the United States Court of Appeals for the Tenth Circuit, enjoined the railroad company from drilling for oil and gas on its right of way. Mr. Justice Douglas delivered the opinion of the court with Justices Frankfurter, Burton and Harlan dissenting. Justice Whittaker took no part.

Section 3 provided "that all mineral lands shall be excepted from the operation of this act." Section 2, the right of way grant, contained no such exception.

We quote from the opinion as follows:

"It would also seem from the words of the Act that, whatever rights may have been included in 'the right of way,' mineral rights were excepted by reason of the proviso in Section 3 excepting 'mineral lands.' The exception of 'mineral lands,' as applied to the right of way, may have been an inept way of reserving mineral rights. The right of way certainly could not be expected to take all the detours that might be necessary were it to avoid all lands containing minerals. But that the proviso applies to Section 2 as well as to Section 3 is plain. While the grant of 'the right of way' is made by Section 2 and the exception of 'mineral lands' is contained in Section 3, the exception extends not merely to Section 3 but to the entire Act.

"To be sure, Congress later on designed a more precise and articulated system for the separation of subsoil rights from the other rights in the western lands. See, for example, the Act of March 3, 1909, 35 Stat. 844. It would have been better draftsmanship, if, in referring to Section 2, Congress had used the words 'mineral rights' instead of 'mineral lands.' Yet it will not do for us to tell the Congress 'We see what you were driving at but you did not use choice words to describe your purpose.'"

The majority opinion held that if grants of a railroad right of way convey a limited fee that means the railroad received all surface rights and all rights incident to a use for railroad purposes. The dissenting opinion defined the term 'limited fee' as a present ownership of the entire interest in land, and an ownership that will continue so long as a contingency leading to a reverter does not occur.

Abandonment

When a railroad easement exists it becomes necessary to determine *if* an abandonment has taken place and *when* an abandonment has taken place. The authorities seem to indicate that mere non-user does not of itself amount to abandonment; and that in addition to the intention to abandon there must be an actual abandonment such as ceasing operations and removing the rails. Some of the conveyances of rights of way provide a period of time after which the title will revert such as "six months after abandonment" or "twelve months after abandonment." We see no good reason to fix a period of time after which title will revert. The actual fact of abandonment must still be established in some proper way in order to make a good record title. To establish abandonment, statutory remedies are usually available.

In the case of Lacy v. East Broad Top Railroad & Coal Co., 77 A. 2d 706 (Pennsylvania, 1951), we quote from the syllabus as follows:

"Public Utilities Commission, by authorizing railroad to abandon a portion of its right of way did not attempt to and could not determine or adjudicate property or contractural rights of railroad or plaintiff, as owner of reversionary interest and at most proceedings before Commission constituted only expression of railroad's intention to abandon its right of way, commission's conditional approval of plan of abandonment and consent of Commonwealth thereto. 66 P. S. Sec. 1122.

"To constitute an abandonment, there must be an intention to abandon, together with external acts by which intention is carried into effect.

"The estate of a railroad does not terminate until there has been an actual abandonment, and mere nonuser of a right of way does not constitute an abandonment."

Miscellaneous Conveyances

Occasionally, deeds to railroad companies containing granting clauses so obscurely worded that it is impossible to say that they refer either to "land" or to a "right" have come before the courts for construction. In some instances these deeds have been held to convey a fee, and in others only an easement.

Under the general rule that if a deed is ambiguous and leaves doubt as to what the parties intended, extrinsic evidence may be resorted to as an aid in its construction, and the circumstances surrounding it and the situation of the parties may be considered in ascertaining their true intent. The courts, however, appear to be unwilling to resort to extrinsic evidence unless in fact there is an ambiguity in the deed—and even then many of the courts refuse outside evidence.

It is interesting that in a few cases the courts have given some weight to the amount of the consideration paid as shown by the deed. If the consideration is nominal it has some significance in indicating that an easement was conveyed. On the other hand, if it is a valuable consideration —an expressed money consideration in a substantial amount—it may indicate that the intention was to convey a fee simple title.

Boundaries and Descriptions

Generally speaking, the terminus of a boundary by a monument is at the central point of the monument.

With few exceptions courses, distances and quantity yield to monuments either natural or artificial. But where monuments called for in a conveyance have been lost or removed and their original locations are not proved, courses and distances (if given) control the description.

When a public or private road is used as a boundary the description runs to the center of the road or street provided the grantor has title to the road or street itself. And the same rule applies to a ditch or a railroad.

Difficulties arise where the boundary cannot be found. Many states have provided a statutory procedure whereby a disputed, lost, destroyed or abandoned boundary may be established. Colorado has such a statute, the first section of which reads as follows:

"118-11-1. When action may be brought.—When one or more owners of land, the corners and boundaries of which are lost, destroyed, or in dispute, desire to have the same established, they may bring an action in the district court of the county where such lost, disputed or destroyed corners or boundaries or parts thereof are situated against the owners of the other tracts which would be affected by the termination or establishment thereof, to have such corners or boundaries ascertained and permanently established. If any public road is likely to be affected thereby, the proper county shall be made a party defendant." (1907)

The same result might be accomplished by quieting title, by perpetuating testimony or by using some similar type of procedure.

A deed, in order to be operative, must contain some description or designation of the land intended to be conveyed,* and the want of a description of the subject matter, so as to denote on the instrument what it is in particular, or of a reference to something else which will render it certain, is a defect which makes the deed wholly inoperative.* A conveyance is void also if the description therein is too vague and uncertain to fulfill the requirement just stated,* as where the starting point of a description cannot be established,* or where the area is not defined.* Whether or not the description in a deed is uncertain must be determined from a construction of the entire deed.*

In order to have the effect of invalidating the deed as a matter of law, the ambiguity must appear on the face of the instrument.* (26 C. J. S., Deeds, Sec. 29, p. 639) (*Footnotes omitted)

Descriptions which the right of way cases have dealt with may be classified as follows:

1. A description which is definite in all respects and from which the land conveyed can be readily located.
2. A description which is so indefinite and defective that no land can be located.
3. A description which uses as a boundary an existing, artificial monument such as a railroad.
4. A description which uses as a boundary an artificial monument which no longer exists.

Here are a few examples of portions of descriptions taken from deeds which relate to railroad rights of way.

1. Adjoining the Company's right of way "as now located."
2. A 100 ft. strip running through and across my farm on the line as now located.
3. So much of the SW¼ of the SE¼ as lies within 50′ of the center line of the main track.
4. Reserving to the Company and its assigns the right of way for said Railway in width and in manner and form as provided by the Acts of Congress in relation thereto.
5. A strip of land 100′ wide, being 50′ on each side of the center of the main line track of the X RR as the same may hereafter be constructed, laid and fixed by the company over the following tract of land owned by grantor.
6. A strip 66′ wide through the following lands (describing them).

All of the deeds containing the above descriptions would require corrective proceedings. In fact numbers 5 and 6 are so vague and indefinite that probably the entire deeds would be considered invalid.

Conclusion

A more complete brief could be written on this subject but my purpose in preparing this address was to present legal principles and cite and summarize only a few of the cases.

I have been surprised by the amount of litigation concerning railroad rights of way. There are numerous reported decisions. It is also interesting to observe that while most of the actual abandonments of railroad rights of way have not taken place in recent years, nevertheless, a great deal of the litigation is fairly recent. I surmise that this has been due in part to discoveries of valuable oil or mineral deposits.

This litigation, for the most part, has been of two kinds.

Suits have been brought to determine whether the railroad or its grantor owns the title upon abandonment. This involves a determination of the kind of a title conveyed by the right-of-way deed, — whether a fee simple or only an easement.

Another type of litigation consists of corrective suits brought to adjudicate record ownerships. In these cases the railroad claims no actual title but perhaps it has become necessary to establish, for instance, the original location of the line of the railroad or the fact of abandonment and other pertinent data in order to make a marketable title in present claimants. Such litigation usually does not go beyond a lower court and consequently there are few reported cases .

I think we may conclude that many right-of-way deeds have been carelessly prepared; that the courts are in conflict as to the construction of these deeds; and that in the absence of a controlling statute or a decision of your state court, it is often difficult to determine who has the title to an abandoned railroad right-of-way.

RELATIVE PRIORITY OF GOVERNMENT TAX LIENS AND PRIVATE LIENS

HOWARD TUMILTY, *Vice President and General Counsel, American First Title & Trust Co., Oklahoma City, Oklahoma.*

The material for this discussion has been obtained almost entirely from the report of the Committee of the Real Property Section of the American Bar Association on that subject, presented at the meeting of the Section in Dallas in 1956.

We propose to discuss statutes and decision under provisions of the federal tax code, as they apply to real estate, without an attempt here to cover the general priority statute (Section 3466 of the Revised Statutes) or liens as provided for in the Bankruptcy Act.

The statutes to be considered then are now 26 U.S.C.A., 6321 to 6323, enacted as a part of the Internal Revenue Code of 1954. These statutes supersede former statutes on the same subject, which were Sections 3670 to 3672 of the 1939 code.

Section 6321, in substance, imposes a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to a delinquent taxpayer.

Section 6322 provides that "unless another date is specifically fixed by law, the lien imposed by Section 6321 shall arise at the time the assessment is made and shall continue until the liability for the amount so assessed is satisfied or becomes unenforceable by reason of lapse of time."

Section 6323, so far as pertinent here, provides that the lien imposed shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed in the office designated by state law, or in the United States District Court Clerk's office, if no state designation, or in the office of the Clerk of the United States District Court for the District of Columbia. (Oklahoma has a law permittting the filing of such notices in the state county clerk's office.)

The source of the power of the United States to enforce collection of taxes due it has its origin in the constitutional provision that "the Congress shall have power to lay and collect taxes" (Constitution, Art. 1, Sec 8). The 16th Amendment to the federal Constitution grants specific power to lay and collect taxes on incomes without apportionment and without regard to any census or enumeration. The United States Supreme Court has never been equivocal in supporting the federal power to tax and to do whatever is necessary to collect the taxes imposed. A century ago, the court said: "The power to collect and disburse revenue and to make all laws which shall be necessary and proper for carrying that power into effect includes all known and appropriate means of effectually collecting and disbursing that revenue, unless some such means should be forbidden in some other part of the Constitution." **Murray's Lessee v. Hoboken Land Co.** 59 U. S. 272. Again, in 1893, the court said: "A government that cannot by self-administered methods collect from its subjects the means necessary to support and maintain itself in the execution of its functions is a government merely in name." **United States v. Snyder,** 149 U. S. 210. Now, in recent years, the court, adhering to the same principles and to a rule which is at the heart of the decisions, holds that the effect of a private lien in relation to federal law for collection of debts due the United States is always a federal question, and that state laws will not be permitted to interfere with the enforcement of revenue liens. **United States v. Acri** (1955), 348 U. S. 211; **United States v. Gilbert Associates** (1953), 345 U. S. 361; **United States v. Security Trust & Savings Bank** (1950), 340 U. S. 47; **United States v. New Britain** (1954), 347 U. S. 81; **Illinois v. Campbell** (1946), 329 U. S. 362.

In observing the lien statutes casually, it might seem to appear that the federal lien will attach only to the equity of the taxpayer as of the date of the creation of the lien, whatever that equity might be under the laws of the state in which the real estate is situated. Some earlier cases seem to some extent to have taken that view, but in later cases involving the enforcement of federal tax liens in judicial proceedings the courts have not followed the simple concept that state law will determine the extent of the property interest of the taxpayer and the relative positions of federal and private liens. Instead, the court has taken the position that "the relative priority of the lien of the United States for unpaid taxes is * * * always a federal question to be determined by the federal courts. The state's characterization of its liens, while good for all state purposes, does not necessarily bind this court." **United States v. Acri,** 348 U. S. 211. Upon this basis the court seems to reason that, to interfere with a federal lien, a competing private lien must have a federal basis rather than a state statutory basis, and that it must meet federal rather than state standards of being a complete and perfect lien. **United States v. Scovil** (1955), 348 U. S. 218. An examining attorney, therefore, is faced with the necessity of endeavoring to decide relative priorities between federal and private liens as a federal question controlled by federal decisions upholding federal supremacy, in an area where there is oftentimes no clear statutory basis for the decisions and where the federal courts are unhampered by state statutes and state decisions, although the latter are applicable to the property owner and private lien owners.

The duration of the federal lien as provided in section 6322 continues until satisfied or it becomes unenforceable by lapse of time, which lapse is referable to a period of six years, as provided in section 6502. It is to be noted here also that federal claims are not barred by a state statute of limitations. **United States v. Summerlin** (1940), 310 U. S. 414.

Said section 6322 makes an important change from the provisions of its predecessor in the 1939 code. The former statute provided for the lien to arise "at the time the assessment list is received by the collector," whereas, the present section states the lien "shall arise at the time the assessment is made." For the mechanics of assessment, see 26 U.S. C.A., Chapter 63, Sections 6301 to 6306; and Regulations, Section 301.-6203-1. The significance of this change concerning the commencement of the lien is especially important to competing lienors who are not protected as a mortgagee, pledges, purchaser, or judgment creditor, because the lien arises from a mere administrative assessment of a tax by an office whose records are not open to public scrutiny. It is therefore truly a secret lien from the time the assessment is made until a local collector causes a notice of lien to be recorded; and, under the 1954 code, it appears there necessarily will be a longer period of time during which many federal liens will remain secret.

The statute mentions only four classes of persons as to whom notice is r e q u i r e d, to-wit: mortgagee, pledgee, purchaser, and judgment creditor. Mr. Justice Jackson, after reviewing the history of the lien statute in a concurring opinion in **United States v. Security Trust & Savings Bank,** 340 U. S. 47, said: "My conclusion, from this history, is that the statute excludes from the provisions of this secret lien those types of interests which it specifically included in the statute and no others." The statute does not attempt to define terms used by the statute; and there is, therefore, left for court determination, the circumstances under which the statute will protect one claiming to be a mortgagee, pledgee, purchaser, or judgment creditor.

With respect to mortgages, the statute obviously covers only bona fide transactions. A mortgage found to be fraudulent, although valid as between the parties, is not entitled to priority. **Hart v. United States,** 207 F. 2d 813, cert. denied 347 U. S. 919. However, a mortgagee's knowledge of a mortgagors' tax delinquency does not give the government priority against an

otherwise valid mortgage. **United States v. Beaver Run Coal Co.,** 99 F. 2d 610. Furthermore, a bona fide mortgage made by a wife holding title as grantee under her husband's fraudulent deed, of which the mortgagee had no notice, is entitled to priority over a federal lien which attached to the husband's property after his conveyance. **United States v. Fidelity & Deposit Co.,** 214 F. 2d 565. It having been held that the federal lien will attach to afteracquired property of the taxpayer **(Glass City Bank v. United States,** 326 U. S. 265), that will be its status against an existing mortgage which purports to cover afteracquired property? As we have heretofore found, in Oklahoma a so-called open end mortgage does not give future advances priority over intervening lien, unless the mortgagee was bound to make such advances. **Garey v. Rufus Lillard Co.,** 196 Okl. 421, 165 P 2d 344. On February 6, 1956, the Internal Revenue Service issued a ruling that Section 6323 affords no protection to lenders under recorded open end mortgages who make future advances subsequent to the time a secret federal lien arises against the mortgagor. **Revenue Ruling,** 56-41. Even if state statutes attempt to give priority to future advances under open end mortgages, they would probably not be recognized by the federal courts as to federal liens, for the doctrine of relation back is so far rejected by the Supreme Court in tax lien cases, and it has been consistently held, as heretofore stated, that state statutes cannot interfere with the enforcement of federal taxes. Priority has been awarded to a federal lien recorded after a real estate mortgage loan was made but before the recording of the deed of trust securing the loan. **Underwood v. United States,** 118 F. 2d 760. What will be the situation where a federal lien arises after the mortgage is recorded, but before the mortgage loan has been disbursed; or where, under a construction loan, the mortgage has been recorded but proceeds of the loan are partially undisbursed when a federal lien arises? The theory of the Internal Revenue Service as to advances under open end mortgages may be equally applicable to these cases, and might also be applied to disbursements of the original loan made after an unrecorded federal lien arises. The same view could be taken as to advances authorized to be made by a mortgagee under a conventional mortgage for discharge of subsequent real estate taxes, expenses paid in defending litigation affecting the mortgagee's interest, or even in foreclosing the mortgage itself.

Before the statute gave protection to purchaser, it was held that even a purchaser for value without notice or knowledge of the federal tax lien had no protection. **United States v. Snyder** (1893), 149 U. S. 210. It was after that harsh decision that the statutes were twice amended to give some protection to classes of innocent persons normally protected in commercial transactions. (See the concurring opinion of Mr. Justice Jackson in Security Trust & Savings Bank case, supra). The Supreme Court has lately defined a purchaser within the meaning of a statute as "one who acquires title for a valuable consideration in the manner of vendor and vendee." **United States v. Scovil** (1955), 348 U. S. 218. That statement would seem to be limited to cases where the title has been conveyed and the entire purchase price paid. If that be true, it leaves untouched situations where there is a contract to buy and sell and the purchaser makes a down payment and agrees to pay the remainder of the purchase price at a specified time after title is accepted. If a federal lien arises against the seller before the balance of the purchase price is paid, will the federal lien? Similar inquiries may be made chaser was entirely ignorant of the lien? Similar iqnuiries may be made as to like situations arising under an installment purchase contract. Should an attorney representing a purchaser under such situations refer to the possibility of undisclosed federal liens; should he demand proof of payment of all the seller's federal taxes which might result in liens; or should he just take a chance and hope that neither he nor his purchasing client will meet disaster?

The statute gives protection, also,

to judgment creditors, and the Supreme Court recently said: "We think Congress used the words 'judgment creditor' in Section 3672 in the usual conventional sense of a judgment of a court of record." **United States v. Gilbert Associates** (1953), 345 U. S. 361. However, the treasury regulation thereon takes a different view and sets up two criteria which must be made by one claiming to be judgment creditor, to-wit: (1) he must be such creditor in a court of record of competent jurisdiction for the recovery of specifically designated property, or for a certain sum of money; and (2) in case of a money judgment, he also must be one who has a perfected lien under such judgment on the property involved. **Regulation, Section** 301.6323- involved. **Regulation,** Section 301.6323-1. The Supreme Court has not yet decided whether the regulation requirement of a perfected lien is in accord with a proper construction of the statute or is merely administrative legislation imposing an additional condition not intended by the statute. It seems that portion of the regulation was langnuage in proposed Section 3672 (c) (3) of H.R. 8300, which Congress did not enact. It seems, therefore, the government will contend that a judgment creditor cannot rely upon a general statutory lien afforded his judgment under a state statute in the conventional sense, but that it must be perfected by seizing specific property by execution and levy before the federal lien arose. See **United States v. Texas** (1941), 314 U. S. 480; **Illinois v. Campbell** (1946), 329 U. S. 362. There is also in this connection the inquiry as to when in point of time a judgment becomes final as to a federal lien. Does this occur when the judgment is entered, or when the trial court subsequently loses jurisdiction to alter it, or when time for appellate review has expired, or a pending appeal has been disposed of, or when under state law the judgment lien arises, or, as referred to, not until the judgment lien has been perfected by execution and a sale of the real estate?

There are a number of persons having liens under state statutes who are not mentioned or given any protection in the federal statute. Among these are improvement, vendor's, landlord's, attachment, garnishment, and municipal and state tax lien claimants. Solely as between a state and the United States, the federal lien will prevail. **New York v. Maclay** (1933), 288 U. S. 290. In a mortgage foreclosure case, taxes due Ohio were liens not entitled to priority as against federal liens alone, but they were given such priority indirectly by ordering their payment out of the share of the sale proceeds allotted to a mortgage and judgment creditor both of whom had priority over the federal liens. **Southern Ohio Savings Bank & Trust Co. v. Bolce** (1956) 165 Ohio St. 201; This formula recognizes federal law as to the priority of mortgages and judgments over a federal lien and the state law as to priority of state taxes over mortgages and judgments, which, in effect, penalizes the mortgagee and judgment creditor who are the very ones section 6323 seeks to protect. To say the least, this is a rather unusual result.

The situation as to improvement liens may come as something of a shock. In one case. (United States v. Colotta [1955], 350 U.S. 808) the federal lien arose after the work was completed, but prior to the recording of the improvement lien. In the other **(United States vs. White Bear Brewing Co.** [1956], 350 U.S. 1010), the federal tax lien arose after the improvement lien came into existence, after it had been recorded under state law and after a suit to enforce it had been instituted and the court had acquired jurisdiction of the parties and the property. By terse per curiam decisions the Supreme Court upheld the priority of the federal tax lien. In the latter case, the effect of the decision was to give the federal tax lien priority, since no judgment specifically determining the existence and the amount of the lien had been entered or become final. The recent case of **Fleming v. Brownfield** (Wash. 1955), 290 P2d 993, is the only present fully written opinion upholding the priority of federal tax liens over previously recorded improvement liens not reduced to judgment, and disregards the older doctrine of "first in

time is first in right," as well as differences between improvement liens, which are contractural in nature, and purely remedical liens, such as attachment and garnishment. The apparent inequity of such a situation under existing legislation has caused the introduction in Congress of H.R. 7967, which, in substance, will give improvement lienors protection under the status as of the date of the commencement of the work of improvement; but this bill has not yet been enacted. The familiar equitable doctrine of lis pendens, likewise, may be in jeoparty, by this kind of decisions. In the White Bear case there was a suit pending and, as stated, the per curiam order did not give any reasoning as to why the government would not be in the position of anyone else acquiring an interest in the taxpayer's realty during the pendency of the suit. If the government is not to be bound by the rule of lis pendens, its supremacy could be held to extend to any situation where a state court has jurisdiction of realty in a pending proceeding, the federal lien thereafter arises, then the property goes to decree or sale, with a later collateral attack by the government after the property has passed into or through the purchaser at the judicial sale. That was the factual situation in the White Bear case. Surely we ought not to be brought to the place where, because of this possibility, we would think it necessary to make the government a party to every equity suit under an allegation that it may have or claim some lien, which could be an almost intolerable burden, both upon litigants and the government.

Briefly, I mention some other types of liens. In **United States v. New Britain** (1954) 347 U.S. 81, municipal real estate tax and water rent liens, which were perfected and completed, were held to be superior to federal liens subsequently arising. Attachment and garnishment proceedings have been held not to give any priority to the private liens claimed, since they are provisional remedies and only evidence a right to perfect a lien, with the rule of relating back not operative as to the federal liens. **United States v. Security Trust & Savings Bank,** 340 U.S. 47; **United States v. Liverpool & London Insurance Co.,** 348 U.S. 215. Likewise, a landlord's lien was held not perfected so as to gain priority over subsequently recorded federal liens. **United States v. Scovil,** 348 U.S. 218.

To summarize, we find, or must assume:

1. These matters are all federal questions, in determining which the courts are not bound by state laws;

2. The federal tax lien takes effect from the date of assessment; and if it thereby antedates a competing private lien, the federal lien will prevail, except as to a purchaser, mortgagee, pledgee, or judgment creditor;

3. A recorded notice of the federal lien is required to establish priority as to a purchaser, mortgagee, pledgee and judgment creditor.

4. Even when a competing lien antedates the federal lien, the latter will prevail, unless the former meets federal standards of being choate and perfected;

5. A competing private lien, specific and choate under state law but in process of judicial enforcement, will not prevail against a subsequently arising federal tax lien, unless the private lien reaches final judgment by a court of competent jurisdiction before the federal lien arose;

6. It is not safe to assume that the doctrine of lis pendens will bind the United States in equity cases pending when the federal lien arose.

There are weighty considerations to be given to the right of the government to enforce tax collections. Need they go so far, however, as to require secret liens, or give the government rights in a taxpayer's property greater than he possesses, or penalize innocent third persons contrary to basic legal concepts so long established for all other relationships?