STATE OF MICHIGAN

COURT OF APPEALS

LEELANAU TRAILS ASSOCIATION and RLTD RAILWAY CORPORATION,

Plaintiffs/Counterdefendants-Appellees,

v

NOEL J. FLOHE, MARY L. FLOHE, WALTER J. HINES, THELA HINES, LOUIS DEYOUNG, ELLY C.M. DEYOUNG, MAGDALENA K. LUINSTRA, JUDSON A. AMMONS, LARRY PRICE, KENNETH W. DEZUR, GEORGE J. HERMAN, MARY C. HERMAN, CHARLES BELANGER, JUDITH BELANGER, JAMES MEBERT, STUART D. WHITTAKER, VELVET A. WHITTAKER, WARREN J. RAFTSHOL, and MARIAN E. WERNER,

Defendants/Counterplaintiffs,

and

AUGUST SHARNOWSKI and BARBARA SHARNOWSKI,

Defendants/Counterplaintiffs-Appellants.

UNPUBLISHED
February 8, 2000

No.210544
Leelanau Circuit Court
LC No. 96-003895-CZ

Before: Sawyer, P.J., and Gribbs and McDonald, JJ.

PER CURIAM.

Defendants appeal as of right from judgment quieting title to a strip of land in the names of plaintiffs. We affirm.

The trial court ruled that a 1902 deed between plaintiffs' and defendants' predecessors in interest was unambiguous and created a determinable fee, subject to a condition subsequent, and that any reversionary interest held by defendants was extinguished by the Possibilities of Reverter and Rights of Entry Act, MCL 554.61 *et seq*.; MSA 26.49(11) *et seq*., and certain inter vivos transfers. The court addressed defendants' de facto condemnation claim, but ruled it was inapplicable in light of the lack of ambiguity in the deed.

Defendants first argue that the trial court erred in ruling that the 1902 deed conveyed a determinable fee and not merely an easement. Actions to quiet title are equitable in nature and are reviewed de novo by this Court. *Dobie v Morrison*, 227 Mich App 536, 538; 575 NW2d 817 (1998). The trial court's factual findings are reviewed for clear error. *Sackett v Atyeo*, 217 Mich App 676, 680; 552 NW2d 536 (1996). The trial court did not err in ruling that the 1902 deed created a determinable fee, subject to a condition subsequent because such an interest is unambiguously created in the conveyance. In light of the this lack of ambiguity the trial court did not err in refusing to use extrinsic evidence to explain the deed or find de facto condemnation. Further, the trial court did not err in ruling that no de facto condemnation occurred.

Initially, we note the confusion stemming from decades of Michigan case law regarding whether a condition subsequent gives rise to a possibility of reverter or a right of entry and the distinction between the two. As *Ludington & N R Co v Epworth Assembly*, 188 Mich App 25, 36; 468 NW2d 884 (1991), pointed out, traditionally a possibility of reverter referred to the future interest remaining in a grantor where a fee simple determinable was created; while a right of entry referred to the interest remaining in the grantor where an estate with a condition subsequent has been created. *Id*. However, many cases discuss a possibility of reverter in cases involving a condition subsequent. See *Schoolcraft Community School Dist No 50, Kalamazoo Co v Burson*, 357 Mich 682, 687; 99 NW2d 353 (1959); *Juif v Dillman*, 287 Mich 35, 38; 282 NW 892 (1938); *Dolby v Dillman*, 283 Mich 609, 613-614; 278 NW 694 (1938); *Oakland Co v Mack*, 243 Mich 279, 286; 220 NW 801 (1928). The parties in this matter have consistently referred to the interest as a reversion, or right or reverter, so we will as well.

As a general rule, courts follow the plain language in a deed if there is no ambiguity. If, however, there is an ambiguity, or if the deed fails to express the obvious intention of the parties, the courts will try to arrive at the intention of the parties. *Taylor v Taylor*, 310 Mich 541, 545; 17 NW2d 745 (1945); *Farabaugh v Rhode*, 305 Mich 234, 240; 9 NW2d 562 (1943). The primary object in interpreting deeds is to determine the intention of the parties from the instrument itself. *Thomas v Jewell*, 300 Mich 556, 559-560; 2 NW2d 501 (1942). The general rule is that where a deed is absolute in its terms, parol evidence tending to show a different agreement or meaning is inadmissible. *Bennett v Eisen*, 64 Mich App 241, 244; 235 NW2d 749 (1975); *Paskvan v Kuru*, 5 Mich App 374, 376; 146 NW2d 677 (1966).

Additionally, interests which extinguish a fee estates are not favored by the law; therefore, provisions that forfeit estates, such as conditions subsequent, are strictly construed. *Central Land Co v Grand Rapids*, 302 Mich 105, 112; 4 NW2d 485 (1942).

In *Quinn v Pere Marquette R Co*, 256 Mich 143, 151-153; 239 NW 376 (1931), a deed to a railroad was determined to unambiguously create a determinable fee subject to a condition subsequent. The grantors provided a warranty deed to the railway, providing a strip of land one-hundred feet wide for railroad purposes only. *Id.* at 146-147. The *Quinn* deed did not contain reversionary language. The Court noted that "right-of-way" had two meanings in railway parlance, potentially meaning both the strip of land upon which the track is laid and the legal right to use the strip. *Id*. The Court reasoned that the grant was for a determinable fee when the deed contains an express intended purpose for the grant and a reverter clause. *Id.* at 154-155. Additionally, in *Epworth Assembly v Ludington & N R Co*, 236 Mich 565, 574; 211 NW 99 (1926), the Supreme Court ruled that deeds created a condition subsequent, also known as a determinable fee, when they provided that land shall "be used for railroad purposes only" and called for reversion if the land ceased being used for railroad purposes.[1] *Id.* at 574.

We find the *Quinn, supra*, and *Epworth, supra*, rulings persuasive authority that the Groessers conveyed a determinable fee because the deed mentions both the purpose of the grant and the reversion. Like the *Quinn* conveyance, the 1902 deed did not mention the word easement. Additionally, the 1902 deed contains words of absolute conveyance. The wording in the *Epworth* deeds was also similar to the 1902 deed in this matter. While it is true that the 1902 Groesser deed references a right-of-way, the *Quinn* decision makes clear that in railroad usage, the term "right-of-way" can refer to both the purchase of the land or the purchase of an easement to use the land. *Id*. at 146-147. The trial court did not err in ruling the 1902 deed unambiguously conveyed a determinable fee, subject to a condition subsequent.

Defendants argue that the railway's acquisition of the strip constituted de facto condemnation of the Groesser property granting the railway merely an easement. Pursuant to *Michigan Central R Co v Garfield Petroleum Corp*, 292 Mich 373, 388; 290 NW 833 (1940), a railway acquires only an easement when land is condemned.[2] Defendants urge this Court to look behind the language of the deed to the circumstances of the 1902 transaction.

Private property may not be taken for public use without just compensation. US Const., Am V; Const 1963, art 10, §2. A "taking" means that government action has permanently deprived the property owner of any possession or use of the property. *Jack Loeks Theatres, Inc v Kentwood*, 189 Mich App 603, 608; 474 NW2d 140 (1991), modified in part 439 Mich 968 (1992). There is no litmus test for when a de facto taking has occurred; however, there must be some action by the government specifically directed toward the plaintiff's property that has the effect of limiting the use of the property. *In re Acquisition of Virginia Park*, 121 Mich App 153, 160; 328 NW2d 602 (1982). These are no similar Michigan cases that address the type of de facto condemnation defendants claim.

The Railroad Act of 1873, under which the Traverse City, Leelanau and Manistique Railroad was incorporated, permitted a train corporation to condemn private property for the purposes of the railway. The railroad commenced such a proceeding against the Groessers in 1902. The Act further

provided that a certified copy of the final order confirming the condemnation shall be filed with the register of deeds. Under the Act, only when the final order is filed in this manner was the condemnation complete and title transferred. The act did not require condemnation to be completed by a warranty deed. Under the statutory scheme, all that was required was registration of the final order. Defendants concede that the 1902 condemnation proceedings were not completed because no final order was filed with the register of deeds.

Defendants have failed to establish a de facto condemnation. While the railroad started condemnation proceedings for the land, the Groessers voluntarily entered into a warranty deed conveying a greater estate than the railroad could have taken under eminent domain. The Groessers were represented by counsel during the proceedings, yet signed a deed creating a determinable fee, as opposed to an easement. Extrinsic evidence will not be permitted to create an ambiguity in an unambiguous deed.

Next defendant argues that reversionary interest created in the 1902 deed was not extinguished either by the common law or the Possibilities of Reverter and Rights of Entry Act. The interpretation and application of statutes is a question of law that is reviewed de novo. *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998).

Pursuant to the common law, the Groessers' four inter vivos transfers of the section twenty-nine property extinguished defendants' reversionary interest. A grantors' attempted conveyance of a possibility of reverter or right of entry nullifies the possibility of reversion or entry. *Juif*, *supra* at 38; *Dolby*, *supra* at 613-614; and *Oakland*, *supra* at 284-286. The right to the reversion or entry cannot be conveyed before the grantee has breached the condition and any attempt to transfer the interest inter vivos nullifies the condition, even for the grantor. *Oakland*, *supra* at 286. At common law only the grantor's transfer to his heirs at death could pass on a right of reversion. *Id*. at 286. This harsh common law rule reflected the disfavor with which divesting conditions were held. *Id*. at 287. Here, the Groessers made four inter vivos transfers, in 1941, 1947, 1971, and 1978. These inter vivos transfers extinguished the right of reversion.

We note that the common law rule was abrogated by statute in 1931. MCL 554.111; MSA 26.851; *Schoolcraft Community School Dist No 50 v Burson*, 357 Mich 682; 99 NW2d 353 (1959). The statute provides:

> The reversionary interest in lands conveyed on a condition subsequent may be granted, conveyed, transferred or devised by the owner of such interest, and by the subsequent grantees or devisees thereof, either before or after the right of re-entry becomes effective: Provided, That this act shall not affect any such interest created before it takes effect. [MCL 554.111; MSA 26.851.]

The statute specifically does not apply to reversionary interests created before the law was enacted. The fact that a number of the Groessers' transfers occurred after the effective date of the statute has no bearing on the applicability of the common law rule. See *Schoolcraft*, *supra* at 683-685. Because defendants' reversionary interest was created in 1902, before the statute was enacted,

the common law rule applies. Therefore, defendants' interest in the reverter clause of the 1902 deed was extinguished by the Groessers' inter vivos transfers.

In light of this ruling, it is not necessary to address defendants' arguments related to the applicability and constitutionality of the Possibilities of Reverter and Rights of Entry Act. The ruling of the trial court is affirmed.

Affirmed.

/s/ David H. Sawyer
/s/ Roman S. Gribbs
/s/ Gary R. McDonald

[1] These interests have been called variously a fee subject to divestment by re-entry for breach of condition. *Dolby v State Highway Commissioner*, 283 Mich 609, 613; 278 NW 694 (1938).

[2] This is opposite to the status of land condemned by the government. Land obtained by the state pursuant to eminent domain power is taken in fee simple, with no reversionary rights remaining in the original owner. *Community College Dist of Monroe Co v Lennard*, 204 Mich App 597, 601; 516 NW2d 146 (1994). In that case the state took property for the use of a state owned railway. The tracks and the state railroad were later sold to a private railroad and eventually purchased by defendant who claimed a fee title interest in the property used for the railroad. This Court agreed ruling that the state had acquired clear title to the land that it later passed on to the subsequent purchasers.