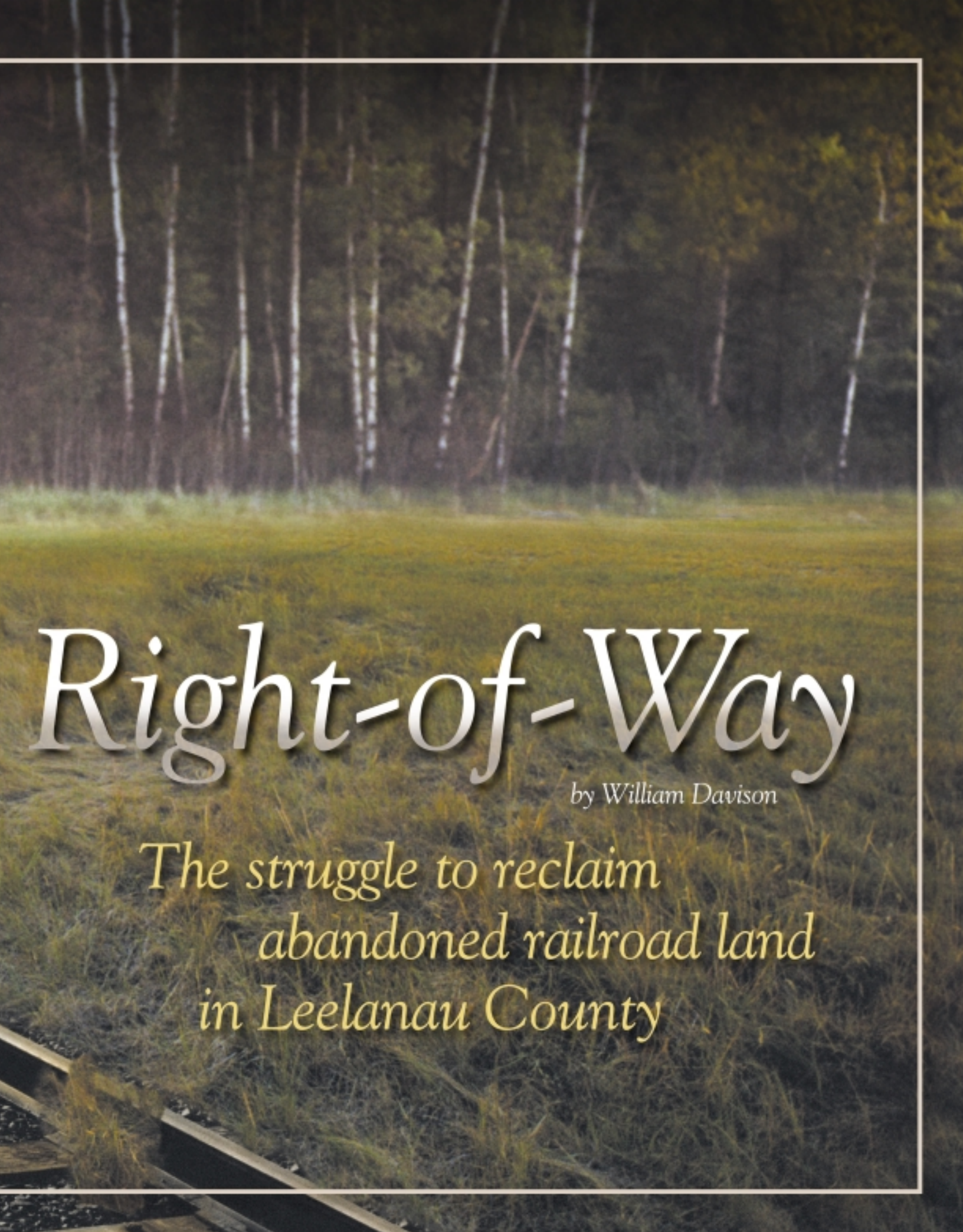
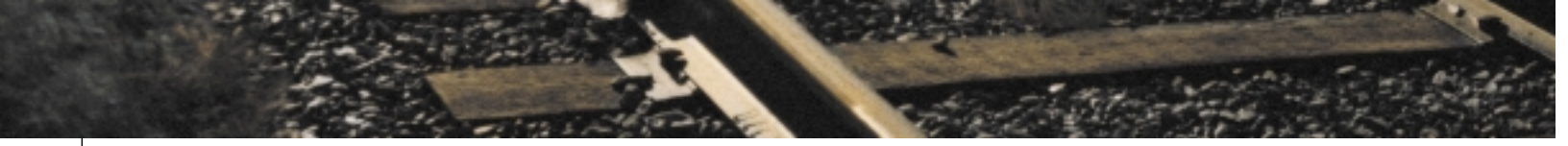

Railroad



Right-of-Way

by William Davison

The struggle to reclaim abandoned railroad land in Leelanau County



Like the rest of the state, northern Michigan is experiencing population growth and residential development. The increased intensity of residential and recreational land use in northern Michigan has generated conflicts between the owners of private property and the rights of the public, particularly in the contexts of abandoned railroad rights-of-way and platted dedications to the public of rights-of-way terminating at the water's edge. The following discussion examines the current state of the law on these issues, both of which are currently before the Michigan Supreme Court.

RAILS, TRAILS, AND REVERTORS

The village of Northport is situated on the northern tip of Leelanau County which, in the 1800s, was a strategic location for access to shipping lanes between Chicago and points north and east. Its waterfront was jammed with large commercial vessels, and the village and surrounding area was, likewise, saturated with the various trades that normally accompanied such waterfront operations.

Though transporting people or cargo by water was relatively routine, getting to Northport by land was very difficult, that is, until the railroad arrived from Traverse City (27 miles to the south) in 1903. Thereafter, commercial shipping slowly declined as rail traffic became the primary mode of transportation—both for people and freight. The benefit to local commerce was enormous and thus the railroad was generally welcomed by all.

Now, approximately a century later, the rails are no more, and the waterfronts of Northport, Suttons Bay, Greilickville, and Traverse City are slowly being converted to open space and recreational uses. The transition of use and ownership of what we will call the "Leelanau Railway" (the legal name, initially, was the "Traverse City, Leelanau, and Manistique Railroad") has run the gamut of just about every conceivable legal entanglement that could befall it—thus providing a "case book," if you will, for practitioners representing owners of property abutting a railroad who want to reclaim it once it's abandoned.

The railroad sent out an advance team in 1902 to negotiate acquisition of the right-of-way between Traverse City and Northport. At the same time, the local newspapers were, of course, following the whole affair, which was certainly a major event. In a March 1902 edition of a local newspaper, it was reported:

> *. . . condemnation proceedings will be instituted against every piece of property where the matter cannot be arranged satisfactorily at once.*

The 27-mile-long corridor passed through four townships and eventually comprised approximately 122 individual acquisitions, an average of more than 1,000 feet per acquisition. The acquisitions were not all of the same interest—not surprising, since different terms were negotiated with different landowners. In this regard, the *key* to recovering a railroad corridor on behalf of a client owning abutting property is the form of the instrument by which the railroad first took title. The outcome of an abutting landowner's claim depends upon the nature and implications of those instruments. A description of the five principal types follows:

Absolute, Unconditional, Conveyance of Fee Title

Let's say that Farmer Jones has a "stand up" 80-acre parcel, one-half-mile-long north and south, and conveys a 100-foot-wide corridor through the center of it, in fee simple, pursuant to a standard warranty or quit claim deed. In that instance, the question is whether Mr. Jones realized that, once that deed was given, he had no legal right to cross that corridor to get from one field to the other. Perhaps the railroad was accommodating and gave him an "ag crossing" about 15 feet wide or so, but what are the implications? First, Mr. Jones can acquire no prescriptive rights, because the crossing is with permission. Second, the crossing, arguably, would be for agricultural use *only*—forever.

Upon abandonment, the corridor would not, of course, revert to Farmer Jones or his heirs; rather, it would continue to be owned by the railroad company, or its successor (including perhaps a "trail group" that might operate a rail banked corridor). Commonly, the 1,000-foot "average" parcel acquired in 1903 may today abut many sub-tracts/lots carved from the original parcel. The original agricultural crossing is of little use to sub-tract owners, not only because it would be limited to agricultural use, but because usually only one or two were granted.

This new circumstance poses the problem: how do the current owners of the sub-tracts get to the other side of their property? They have two options: First, they can acquire the necessary access by negotiation and agreement with the current owner of the railroad corridor. Alternatively, the owner can "condemn" a private right-of-way under MCL 229.1, et seq., which was held constitutional in *McKeighan v*

Parties to land transactions over a century ago cannot be blamed for failing to foresee the problems that would result from the fundamental changes that have occurred in northern Michigan's economy, land uses, and modes of transportation.

Fast Facts:

A land-owner's claim to abandoned railroad land is dependent on the nature and implications of the original terms of agreement.

Michigan railroads hold the authority to condemn land for use, but this only results in an easement.

Grass Lake Township, 234 Mich App 194; 593 NW2d 605 (1999) app dismissed 605 NW2d 319. This process can be expensive, however, because the condemning party not only has to pay for the land, but either litigant can remove the case to circuit court where, in essence, it starts all over again. MCL 229.11.

Note that the condemnation option is available only if the stranded parcel is truly landlocked (i.e., absolute necessity for the private condemnation is required). What if that is not the case, and the owner of the railroad corridor wants to play hardball by demanding an exorbitant sum for permission to cross and/or imposing harsh restrictions on the crossing (i.e., to serve only one house, no commercial activity, etc.)?

The only recourse appears to be an uphill challenge of whether a railroad has the legal capacity to acquire anything but an easement for a right-of-way. In other words, is the acquisition of the fee title simply ultra vires? The rationale for this is suggested by MCL 462.223(b) (formerly MCL 464.9(b)), which says:

> *A railroad company shall possess the general powers . . . (b) to receive, hold, and take such voluntary grants and donations of real estate and other property that shall be made to it . . . the real estate . . . shall be held and used for the purpose of the grant only.*

Further, railroad companies have been given the state's authority to condemn, to enable them to achieve what is, in essence, a public purpose—providing transportation to all. The grant of such a power is a powerful negotiating tool, which might lead a Michigan court to conclude that an otherwise unconditional conveyance of the fee retains an "eminent domain flavor," causing the conveyance of an apparent fee to be construed as one of an easement instead. See *Presault v United States*, 100 F3d 1525, 1537 (Vt; Fed. Cir. 1996). As noted below, Michigan railroads acquiring a right-of-way by condemnation hold only an easement. This argument was rejected in the unpublished decision of *RLTD v Flohe, et al.*, Michigan court of appeals #210544, 2/8/2000.

In any event, counsel pursuing this theory would first have to overcome or distinguish *Attorney General v Pere Marquette R Co*, 263 Mich 431; 248 NW 831 (1933), which held that a railroad company may own its railroad corridor in absolute fee title. However, in reviewing that opinion, one should first read MCL 462.223(b), noted above, and then perhaps question whether it was appropriate, at page 433, for the court to equate a "voluntary grant" with a "donation," and then distinguish a "voluntary grant" from a "purchase." In so doing, the court ignored one of the standard rules of statutory construction, which is that each part of a statute is to be construed as having significance (73 Am Jur 2d, Statutes § 250).

Accordingly, if a voluntary grant and a donation *are* different, then a voluntary grant must be a negotiated transaction between two willing and able parties. Under this interpretation, the Court's statement at page 433 that "land acquired by purchase is not subject to such restrictions," is not correct, because negotiated transactions would be subject to what the court acknowledged to be a statutory "restriction."

According to Petoskey attorney William Conn:[1]

> *I believe that all alleys, streets, highways, rights of way, and any thoroughfare that is available for public use is an easement.*
>
> *Railroads are not an outgrowth of the Common Law. They are the product of legislative action by elected representatives, whose sole duty is to benefit the citizenry. Every railroad company's charter is stamped with the imprimatur of public service.*
>
> *The 1933 Pere Marquette cases* [*Attorney General* and *Quinn*, discussed in this article], *believed seminal by railroad companies, are ripe for reversal. Current cases should not slavishly follow the past (in*

The Legal Milestones of a Typical Railroad Right-of-Way

1. First, the railroad right-of-way is acquired from landowners, by donation, voluntary grant through negotiation, or by condemnation. The types of interests acquired vary from fee ownership to mere easements, and include various types of interests in between, such as a fee subject to a reversion if the railroad use is abandoned.

2. As with the type of interest acquired, *non use* of a railroad corridor can take several forms, but usually only legal abandonment will trigger termination of an easement, or the enforcement of a reverter clause. That will involve factual matters, such as intent.

3. If a railroad chooses to cease operations, certain regulatory issues come into play. Federal and/or state railroad agencies normally must give permission for a railroad to cease operations, because railroads are quasi-public in nature, and serve a public purpose. Cessation of their operation can have a negative impact on the businesses and travelers that have relied on that mode of transportation.

4. Further, railroads have the statutory ability to "rail bank" corridors that are no longer used, so that legal abandonment will not occur. These legislative schemes are designed not only to preserve the corridor for future rail use, but also to accommodate use of the rights-of-way as trails ("rails to trails"), primarily for recreational purposes. Option rights are involved. See MCL 474.58; 16 USC 1247(d); see also MCL 324.72101, et seq.

5. If a railroad corridor is abandoned and not "rail banked," abutting landowners have a claim to the corridor if the interest of the railroad was one of an easement, or a conditional fee with a right of reverter. On the other hand, if the railroad holds fee title, it is usually free to do what it chooses with the corridor, provided applicable laws (such as the Land Division Act and local zoning) are complied with (but see *Bingham Township v RLTD*, below).

stare decisis) those decrees that were themselves molded by the socio-economic times of their decision. Circumstances change, so must decisions imbued with a public interest.

Deed Conveying Fee Simple, but with a Reverter "to the Grantor, His Heirs or Assigns" in the Event the Railroad Uses Cease

This common instrument is of interest to abutting landowners because the express language suggests a "lay down" for recovery of the corridor. Two significant obstacles to this theory exist, however.

The first is MCL 554.61, et seq., which was adopted in 1968 and says that reverters will be extinguished unless a notice is recorded every 30 years, similar to the scheme used in the Dormant Minerals Act (MCL 554.291, et seq.). The Reverter Act also says that, with respect to reverters existing prior to the effective date of the act (including probably 95 percent of railroad reverters), the holders of the reverter had only one year from the date of the act to record the notice, or the reverter was lost. With the supplements of the statutes being published only several times a year back then, how many lawyers would have known about the one year deadline, much less lay people who would have no logical reason to seek out such legislation in 1968?

Understandably, the constitutionality of this statute was challenged in *L&NR Co v Epworth Assembly,* 188 Mich App 25; 468 NW2d 884 (1991), but the statute was upheld. The landowner argued (unsuccessfully) that the statute was inapplicable to public railroads, under the "public purpose" provision of subsection 2 of the act. Although the portion of the opinion rejecting this argument was watered down somewhat because the court relied, in part, on the fact that that particular railroad was "not for servicing the general public," 188 Mich App at 40, the statute is there to be dealt with, and the court of appeals has upheld its constitutionality; thus, any challenge henceforth will probably have to be strongly linked to the public nature of railroads, as expressed in the early case of *Swan v Williams,* 2 Mich 427 (1852).

Even if the abutting land owner did, in fact, record the notice of preservation of the reverter, or otherwise obtained a favorable ruling regarding the inapplicability of MCL 554.61, et seq., the highest hurdle remains: the common law principle that a right of reverter cannot be assigned (other than via an intestate estate). See Title Standard 9.11. Although this rule was abolished by statute in 1931 (MCL 554.111), the statute expressly recited that it was not to be applied retroactively, leaving the majority of the present railroad corridors "protected" from reverter claimants.

With the help of research from Professor Eric Kades, of Wayne State University, one of the abutting property owners in the Leelanau Railway litigation, argued that this principle really applied only to rights of entry, not reverters. The court of appeals effectively disagreed in *RLTD,* supra, but without specifically discussing Professor Kades' theory. As this decision has no precedential value, query whether this theory can be revived.

For these reasons, deeds with reverters are certain to generate interest, but, as we found in Leelanau County, a claim based on a reverter is a struggle.

Conveyances of the Fee "For Railroad Purposes Only"

This common form of instrument may encourage litigation by abutting property owners; however, as the court stated in *Quinn v Pere Marquette Railway,* 256 Mich 143, 151; 239 NW 376 (1931):

. . . as a railroad company may take real estate only for railroad purposes, the declaration that it is to be so used is merely an expression of the intention of the parties that the deed is for a lawful purpose.

Such a narrow reading of the habendum clause in railroad conveyances does little to fortify the reverter claims of abutting property owners when railroad use is abandoned.

The Conveyance of a "Right-of-Way"/Easement

This is another common type of grant, but takes several forms that often generate litigation.

Normally, the grant of a right-of-way is the grant of an easement (132 ALR at 149; 65 Am Jur 2d, § 77). Whenever the language of conveyance permits, an abutting land owner should argue that an easement was intended, rather than a fee with a reverter, for the reasons

Public Road Ends/ Private Obstructions

As its name implies, Northport was, indeed, a port for commercial vessels which, of necessity, were serviced by various roads running to the waterfront. That same waterfront, in the late 1800s and early 1900s, was occupied by "fish houses" that area fishermen erected to house, dry, and mend fish nets, and store other commercial fishing paraphernalia. Over the years, as fishing declined, most of these fish houses disappeared, but one of them did not and, moreover, was situated within the lakeward terminus of one of the village streets. That fish house was found by a circuit judge to have been erected in or shortly after 1918, 11 years after the state legislature passed RJA § 5821(2), MCL 600.5821(2) in 1907. That legislation eliminated the statute of limitations within which municipalities could seek removal of, or otherwise take action regarding, private street obstructions.

The extent to which that fish house may remain is currently before the Michigan Supreme Court (*Steffens v Village of Northport, et al.;* leave granted; SC Docket #114741), which has heard arguments and has the matter under consideration. It is anticipated that the case will have substantial impact upon the following issues, which are common to typical "road end" cases: (1) Does the dedication to the public of roads in a plat lapse solely by the expiration of a period of chronological time; i.e., without intervening acts of abutting property owners? and (2) Do acts of acceptance as to part of a dedicated road constitute an acceptance of all of the road, or only of the part of the road upon which the acts of acceptance occurred?

Lapse

If a proprietor of a plat dedicates roads in a plat to the public, the public must accept the dedication before it is effective. Acceptance can be formal (by resolution) or informal (by working, using, maintaining, and otherwise asserting jurisdiction over it).

Practitioners in this field are well aware of cases such as *Vivian v Roscommon Co Bd of Rd Comm'rs,* 433 Mich 511; 446 NW2d 161 (1989), and *Kraus v Department of Commerce,* 451 Mich 420; 547 NW2d 870 (1996). *Vivian* discusses the ramifications

of MCL 560.255b, which creates, by a 1978 amendment, a presumption of municipal acceptance of dedications in plats, and considers the extent to which that amendment is to be applied retroactively to earlier plats. The problem is that litigants continue to cite *Vivian* for opposing principles, i.e., that the statute is and is not to be applied retroactively.

Similarly, *Kraus* is cited for the opposing propositions that the dedication (assuming the statutory presumption is inapplicable) continues indefinitely (absent inconsistent acts by abutting land owners) or, that the dedication expires within a ''reasonable'' period of time. It is anticipated that the court will clarify the law on this issue, and perhaps thereby reduce litigation prompted by the current uncertain state of the law.

Acceptance of Part / Acceptance of All

When acceptance is accomplished by working on the road (i.e., by informal acceptance), the question has been raised: How much of the road is accepted by the work done on the road, if the work does not cover all of the road? Of course, road commissions do not have an unlimited budget and normally will not open a road unless the need exists, along with the funds to open and maintain it. The issue usually crops up when an abutting owner places an encroachment in a platted road, and then the municipality, or perhaps other land owners in the subdivision, object to the encroachment.

If part of the road had been opened up and worked, and if acceptance of that part is acceptance of the entire road, then the municipality, or the other land owners, could force the encroaching party to remove the obstruction, because after the 1907 amendment to RJA § 5821(2) such obstructions no longer enjoy the protection of the statute of limitations. If acceptance of part is not acceptance of all, however, the encroaching owner could argue that the 1907 legislation is irrelevant, since the encroachment is not on a public road. In that case, the statute of limitations would remain applicable and the obstruction would not have to be removed if it had been there for more than 15 years. To resolve this issue, the Supreme Court will have to reconcile apparently conflicting case law:

> After such a lapse of time, the dedication to public uses must be regarded as confined to the bounds within which the action of the public with the presumed acquiescence of the donor has practically limited it.
>
> *County of Wayne v Miller,* 31 Mich 447, 450–451 (1875). See also *Field v Village of Manchester,* 32 Mich 279, 281 (1875).

> It has been repeatedly held that it is not essential that every part of the highway, in length or width, should be worked and traveled in order to show the intention of the public to accept the entire highway.
>
> *Crosby v City of Greenville,* 183 Mich 452, 460; 150 NW 246 (1914).

As with *lapse,* it is anticipated that the court will clarify this issue and thus assist trial courts in dealing with the numerous competing claims to dedicated roads generated by the current uncertain state of the law.

already mentioned. When a railroad corridor that is subject to an easement is abandoned, there is no question that the corridor revests to the owner of the land from which the easement came. *Westman v Kiell,* 183 Mich App 489; 455 NW2d 45 (1990) *lv den* 437 Mich 880. This does not, however, answer the question posed by a deed that is labeled, in the header, as a "Right-of-Way Deed," yet contains nothing in the text about a right-of-way. For the answer, reference is customarily made to *Quinn,* supra, at 150–151, in which the court stated:

> *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.*
>
> * * *
>
> *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.* (Emphasis added.)
>
> 256 Mich at 150–151.

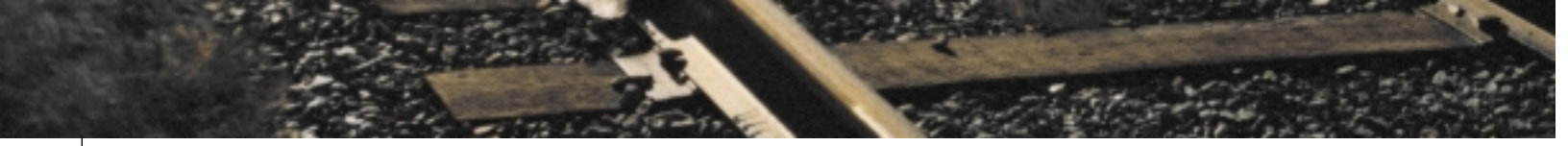
While the guidelines of *Quinn* appear to be clear, in *RLTD,* supra, the court of appeals held that a grant "for the purpose of a railroad right-of-way'' conveyed the fee. The ruling of the court of appeals is also arguably inconsistent with the principle in a case cited in *Quinn, Lockwood v Railway Co,* 103 F 243 (CCA 1900s), in which the court held:

> *Where the granting clause of a deed declares the purpose of the grant to be a right-of-way for a railroad, the deed passes an easement only, and not a fee, though it be in the usual form of a full warranty deed.*
>
> Id. at 248.

The first step, therefore, is to match up the deed by which the railroad corridor was created with the instructive language in *Quinn,* add to it the language from *Lockwood,* and then hope to persuade the court that, viewing the document ''corner to corner,'' an easement was intended.

Condemnation

As already mentioned, a railroad company's acquisition of property by condemnation vests in the railroad an easement only. *Michigan Central R Co v Garfield Petroleum Corp,* 292 Mich 373, 388; 290 NW 833 (1940).



THE LEELANAU RAILWAY CASE

With the foregoing in mind, let us examine the transactions and the litigation (including *RLTD*, supra) that ensued involving Leelanau Railway.

The portion north of Suttons Bay was sold off to the abutting property owners. Though some of them might have had legal arguments suggesting that they should not have to pay for the corridor, considering what happened elsewhere on the same corridor, it is unlikely that any of them now have second thoughts.

As to the portion south of Suttons Bay, the railroad corridor was sold to a private trail group who then started to physically develop it as a non-motorized trail, resulting in the abutting property owners placing protest barricades on the corridor. That precipitated *Lawsuit #1* (*RLTD*, supra). The titles acquired by the railroad on the properties owned by the abutting owners in *Lawsuit #1* were either absolute warranty deeds, deeds with limited reference (i.e., in the header only) to ''right-of-way,'' and/or deeds containing reverter language. The trial court ruled that a fee was conveyed, and that the reverter language was no longer enforceable, for the reasons discussed above.

Because the trail severed the properties of many of the abutting owners, most prudently negotiated permanent crossing rights, rather than pursue an appeal. One abutting owner elected to appeal to the court of appeals, however, because the unique language in the instrument given the railroad lent itself to arguments that the others did not; nevertheless, the court of appeals ruled that the deed conveyed a fee with a reverter (rather than an easement), that the reverter had been assigned, and was thus no longer enforceable (Title Standard 911). The court therefore did not have to consider the argument of whether the ''public purposes'' exemption of the 1968 act (MCL 554.64) applied. That prompted the last abutting owner to, likewise, negotiate crossing privileges, in exchange for releasing all claims to the corridor.

That did not put an end to the railway litigation, however. *Lawsuit #2*, was, in essence, an intervention (by one of the parties to *Lawsuit #1*) in an abandonment proceeding before the U.S. Surface Transportation Board (*RLTD v STB*), by which RLTD sought to avoid a legal abandonment by having the corridor rail banked. As mentioned above, even though a local court might have ruled that the railroad acquired only an easement, if the corridor was properly rail banked (i.e., not legally abandoned), a claim to the corridor by an abutting owner would be fruitless. That case ended up in the Sixth Circuit, 166 F3d 808 (CA 6, 1999), which held that the corridor was, in fact, legally abandoned, and thus not properly rail banked.

The opinion is very instructive on the abandonment procedures regulated by the Surface Transportation Board, as well as the rail banking process. The decision was crucial to the interests of the abutting land owners, because, while they still had to prove abandonment under state law (i.e., non-use and intent; *McMorran Milling Co v Pere Marquette Ry Co*, 210 Mich 381, 393–94; 178 NW 274 (1920)), they likely would not have had that opportunity without the Sixth Circuit's decision.

The trail group faced further opposition when *Lawsuit #3* was commenced by one of the four townships through which the corridor passed, seeking to compel the trail group to comply with local zoning. The trail group argued that local zoning was preempted by the Michigan Trailways Act (MCL 324.72101, et seq.; MSA 13A.72101, et seq.), even though the trail had not yet been formally designated as a "Michigan trailway" under the act. In a 7–0 decision issued April 18, 2001, the Supreme Court (Case #115602) reversed the trial and appellate courts, declaring the MTA not applicable to non-designated trails. It therefore did not have to resolve the preemption issue.

Finally (perhaps), one owner of land abutting the railway had a completed railroad condemnation in his chain of title, and the purported owner (RLTD) sold that portion of the corridor to a local Indian tribe. Normally that would be a green light for claiming the corridor, not only because the condemnation created only an easement, but because a sale of a portion of a corridor is typically a per se legal abandonment. *Boyne City v Crain*, 179 Mich App 738, 746–747; 1989. However, the abutting owners (who have not filed suit) now face a potential immunity defense to a quiet title suit, even though the land is not on the Indian reservation. Does it not sound farfetched that there could be no recourse in state or federal court? See *Leelanau Transit Company v Grand Traverse Band of Ottawa and Chippewa Indians*, U.S. Dist. Ct.; Western Dist. of Mich., So. Div.; File No. 1:92-CV-240; pp 8–10, Opinion of the Court, dated 2/1/94. This may be a subject for another article.

Regardless of what happens with the zoning case before the Supreme Court (i.e., presumably, the township cannot reasonably "zone away" a trail), the trail group, known as Leelanau Trails Association ("LTA"), now enjoys a continuous non-motorized trail from Traverse City to Suttons Bay. This has been achieved primarily through the efforts of two fine Traverse City tort lawyers, Thomas L. Phillips and George Thompson, who volunteered their services to the trail group.

CONCLUSION

Parties to land transactions over a century ago cannot be blamed for failing to foresee the problems that would result from the fundamental changes that have occurred in northern Michigan's economy, land uses, and modes of transportation. Our task today is to devise solutions to problems of ownership and access in the context of these vastly changed circumstances. In that regard, yesterday's statutory and decisional tools require interpretation and clarification by the Michigan Supreme Court to remedy the conflicts that have resulted from the current uncertain state of the law. ✦

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FOOTNOTE

1. Thirty-year title examiner for, and ex-president of, Burton Abstract & Title and St. Paul Title Insurance Companies; former long-time member of the Michigan Title Standards Committee and member of the Real Property Section of the State Bar. Currently railroad right-of-way advisor for MDNR and Michigan Bell Telephone.