Honorable Catherine Shaffer
Date of Hearing: August 24, 2001
Time: 11:00 a.m.

SUPERIOR COURT OF WASHINGTON
FOR KING COUNTY

GERALD L. RAY and KATHRYN B. RAY, husband and wife, Plaintiffs, v. KING COUNTY, a political subdivision, Defendant.	No. 00-2-14946-8 SEA **RAYS' OPPOSITION TO COUNTY'S MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

Plaintiffs, Gerald and Kathryn Ray, agree that this case should be decided on summary judgment. This case involves the construction of a deed by Bill Hilchkanum to the Seattle, Lake Shore and Eastern Railway Company, dated May 9, 1887. The construction of a deed is generally a matter of law for the court. *Harris v. Ski Park Farms*, 62 Wn.App. 371, 375 (1991). However, as will be seen, summary judgment should be granted in favor of Ray, not the County.

ARGUMENT

I.

THE HILCHKANUM DEED CONVEYS ONLY AN EASEMENT

Ray and King County are in agreement that the intent of the parties controls the construction of the deed. There is further agreement that in determining intent, the Court should focus on three general factors, those being (a) the specific language of the deed, (b) the

circumstances surrounding the deed, and (c) the subsequent conduct of the parties. *Brown v. State*, 130 Wn.2d 430, 437 (1996).

In seeking summary judgment, King County has provided this Court with a very superficial and inadequate analysis. As will be seen, all three factors conclusively establish that Hilchkanum and the railroad company intended the conveyance to be a right of way **easement**, and not conveyance of fee title to the land.

A. THE LANGUAGE OF THE DEED

The Court should compare the language of the deeds at issue in *Brown v. State*, 130 Wn.2d 430 (1996) with the language of the Hilchkanum deed. In *Brown*, the Court recited the language of one of the typical deeds as follows:

> KNOW BY ALL MEN BY THESE PRESENTS, that Geo. D. Brown … do hereby convey and warrant unto the CHICAGO, MILWAUKEE AND ST. PAUL RAILWAY COMPANY OF WASHINGTON, its successors and assigns, **a strip of land**, one hundred feet in width, extending over and across from the South side to the East side of the following described tract of land …

Having conveyed a "strip of land" in the granting clause, the rest of the deed is consistent and provides as follows.

> HEREBY CONVEYING a **strip, belt or piece *of land*** fifty feet in width on each side of the center line of the Railway of said Company, as now located and established over and across said land …
>
> HEREBY GRANTING AND CONVEYING to said Company, its successors and assigns, **a fee simple title to said strip of land**, …

Brown, 130 Wn.2d at 434-35 (emphasis added).

The Hilchkanum deed states:

> In consideration of the benefits and advantages to accrue to us from the location construction and operation of the Seattle Lake Shore and Eastern Railway in the County of King in Washington territory we do hereby donate grant and convey unto said Seattle Lake Shore and Eastern Railway Company a **right of way** one hundred (100) feet in width through our lands in said County described as follows to wit …

1. The Hilchkanum Granting Clause Limits the Estate Conveyed

According to King County, the Hilchkanum grant "does not contain language specifying that the strip of land is granted for the 'purpose of a right of way for a railroad.'" County's Motion at 10:1-2. The County's position ignores the plain language of the granting clause.

In *Brown v. State* the Washington Supreme Court has established that the term "right of way," when used in the **granting clause,** is intended as a limitation on the estate conveyed and shows conclusively that the parties conveyed a mere easement. The *Brown* Court held:

> These cases are consistent with the majority of cases that hold the use of the term "right of way" **as a limitation** or to specify the purpose of the grant generally creates only an easement. **Conversely**, where there is no language in the deed relating to the purpose of the grant or limiting the estate conveyed, and it conveys a definite strip of land, the deed will be construed to convey fee simple title.

Brown, 130 Wn.2d at 439-440 (emphasis added; citations omitted). Here, the term "right of way" is language in the deed relating to the purpose of the grant and limiting the estate conveyed.

The position in *Brown* that granting a "right of way" limits the conveyance to an easement is a long held Washington rule. In *Morsbach v. Thurston County*, 152 Wash. 562 (1929), the Court established the rule as follows:

> [I]t is elementary that, in cases where the **granting clause** of a deed declares the purpose of a grant to be a **right of way** for a railroad, the deed passes an easement only, not a fee.

Morsbach, 152 Wash. at 565 *citing* 1 Thompson on Real Property, § 421 (emphasis added).

The Hilchkanum deed easily meets this rule. Obviously, the granting clause conveys a right of way. That term is expressly stated. Moreover, the purpose of the right of way is not just to a railroad generally, but use of the right of way is specifically limited to "location, construction and operation" of the railroad. In fact, the Hilchkanum deed is more limiting than most deeds, including the deed in *Morsbach*. The operative language in the *Morsbach* deed provided:

> …do by these presents give, grant, bargain, sell and convey unto said Northern Pacific Company, or its assigns, the following described premises, viz.: The **right of way** for the construction of said company's railroad in and over the south half of …

Morsbach, 152 Wash. at 564 (emphasis added). Just as this language in *Morsbach* conveyed a mere easement, so also the Hilchkanum deed must be construed as conveying a mere easement.

The Washington Supreme Court has repeatedly reaffirmed the rule in *Morsbach* as controlling.

> [I]t is clear that we **adopted the rule** that when 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.

Swan v. O'Leary, 37 Wn.2d 533, 537 (1950).

The strength of this rule is illustrated in *Veach v. Culp,* 92 Wn.2d 570 (1979). In *Veach*, the granting clause was in quit claim form ("remise, release and forever quit claim") and also indicated that a "parcel of land" was being conveyed. The deed stated:

> Do by these presents **remise, release and forever quit claim** unto said party of the second part, and to its assigns, all that certain lot, piece, or parcel **of land** situate in Whatcom County … to-wit: A **right of way** one hundred feet wide, being fifty feet on each side of the centerline.

Veach, 92 Wn.2d at 572 (emphasis added). Although raising some ambiguity by being in the form of a quit claim deed, and including language regarding a "parcel of land," the Court nevertheless concluded that the reference to "right of way" in the granting clause meant only an easement was conveyed.

> Given the language of the deed explicitly describing the conveyance of a right of way and given the rule of *Swan v. O'Leary* and *Morsbach v. Thurston County*, we conclude the deed conveyed an easement, not fee title.

Veach, 92 Wn.2d at 574. The rule was subsequently reaffirmed in *Roeder Co. v. Burlington Northern, Inc*., 105 Wn.2d 567, 572 (1986), and most recently, in *Brown*. 130 Wn.2d at 439 and n. 6 (acknowledging *Roeder* and quoting *Swan*). As held in *Roeder*,

> Since the granting clause of the … deed declares the purpose of the grant to be a right of way for a railroad, the deed passes an easement, not a fee.

Roeder, 105 Wn.2d at 571. Again, it is helpful to see the relevant language in the granting clause in the deed at issue in *Roeder,* which states:

> conveys and warrants unto Bellingham and Northern Railway Company … for all railroad and other right of way purposes, certain tracts and parcels of land situate in City of Bellingham …

Roeder, 105 Wn.2d at 569. If anything, this language is less restrictive and more open-ended than the Hilchkanum deed. Accordingly, the application of the Washington rule clearly mandates holding that the Hilchkanum deed conveys a mere easement.

Despite these well established cases, King County contends that use of the term "right of way" is not conclusive. County's Motion at 9:2. The County quotes *Brown* as follows:

> The words "right of way" can have two purposes: (1) to qualify or limit the interest granted in a deed to the right to pass over a tract of land (an easement), or (2) to describe the strip of land being conveyed to a railroad for the purpose of constructing a railway.

Brown, 130 Wn.2d at 441; see County's Motion at 9:4-7. *But the County does not reveal to the Court the very next sentence*. The County ends the quote and immediately concludes "[t]herefore, the mere use of the term "right of way" in the Hilchkanum deed is not dispositive." County's Motion at 9:8. Of course, the omitted next sentence in *Brown* explains that the term "right of way" is dispositive when used in the granting clause.

> Unlike *Swan*, *Veach*, and *Roeder*, where "right of way" was used in the **granting** or habendum clauses **to qualify or limit the interest granted**, "right of way" in the deeds at issue here appears in either the legal description of the property conveyed or in the portion of the deeds describing Milwaukee's obligations with respect to the property. … Used in this manner, "right of way" merely describes a strip of land acquired for rail lines; it does not qualify or limit the interest conveyed in the granting or habendum clauses.

Brown, 130 Wn.2d at 441-42. Of course, the Hilchkanum deed utilizes "right of way" in the granting clause. Hilchkanum squarely fits within the rule of *Swan*, *Veach*, and *Roeder*, and is distinguished from the deeds in *Brown* which did not use the term "right of way" within the granting clause.

In addition to expressly granting a "right of way," the Hilchkanum deed has additional language that corroborates that the estate conveyed was limited. In *Brown*, the Court acknowledged that language "specify[ing] the purpose of the grant" or "relating to the purpose of the grant" underscores the intent to convey only an easement. *Brown*, 130 Wn.2d at 439-40. Of course, the Hilchkanum deed expressly stated the purpose of the right of way was for "location, construction and operation" of the railroad. This deed language is clearly more limiting that just a general acknowledgement that the conveyance is to "a railroad for any purpose" Here, this purpose was the **consideration** provided to Hilchkanum for the grant. It is a critical term of the conveyance. Under this provision, the railroad was not free to use the land in any way it wanted, as a fee owner would be allowed. For example, the railroad could not come onto the right of way and grow corn. Such a farming use is prohibited by the grant.

The railroad was only authorized to use the right of way in the manner specified by the language of the grant. This language necessarily limits the conveyance and should be viewed as conclusive in showing that the railroad acquired only a right of use for a specific and defined purpose, *i.e*. a mere easement.

2. The Hilchkanum Deed Does Not Convey a "Definite Strip of Land"

(a). Plain Language of the Granting Clause

In its memorandum, King County repeatedly attempts to characterize the Hilchkanum deed as conveying a definite "strip of land." Again, however, a comparison of the Hilchkanum deed to the deeds at issue in *Brown v. State* will demonstrate the fallacy of the County's position.

The Court is invited to review again the language of the deeds in *Brown*. *Supra* at 1-2. It is readily observed that the granting clause in the *Brown* deed conveys a strip "of land." It will also be noticed that the granting clause in *Brown* does not convey a "right of way." It should be further noticed that the Brown deed contains no language, such as in the Hilchkanum deed that limits use to location, construction and operation of a railroad.

This deed language in *Brown* obviously conveys "land" as opposed to a mere right to use land for a specific purpose. It should not be a surprise that the Washington Supreme Court concluded that "[i]n this case … the granting clauses convey definite strips of land." *Brown*, 130 Wn.2d at 437.

Next, compare the deed language in Hilchkanum's conveyance. The granting clause conveys a right of way; it does **not** convey a "strip **of land.**" The difference in the plain language is obvious. One conveys a "strip of land," the other conveys a "right of way."

The application of Washington law is straightforward. Every Washington case, including *Brown*, follows the same approach. In each Washington case where the **granting clause** referred to a "strip of land" or "tract of land," the deed was held to convey fee simple title. *Scott v. Wallitner*, 49 Wn.2d 161, 163 (1956) (granting clause conveyed "strip of land fifty feet in width"); *Roeder Company v. K & E Moving & Storage Co., Inc.*, 102 Wn.App. 49, 51 (2000) ("tract of land fifty (50) feet wide"). The same is true in *Brown* where reference in the granting clause to a "strip of land" meant the conveyance was in fee.

Conversely, in each Washington case where an easement has been found, the granting clause of the pertinent deed referred to conveyance of a "right" or "right of way." *Biles v. Tacoma, O & G.H.R. Co.*, 5 Wash. 509 (1893); *Reichenbach v. Washington Short Line R.R.*, 101 Wash. 375 (1894 (granting clause referred to "right of way"); *Pacific Iron Works v. Bryant Lumber & Shingle Mill Co.*, 60 Wash. 502, 505 (1910) (same); *Morsbach v. Thurston County*, 152 Wash. 562, 564 (1929) (same); *Swan v. O'Leary*, 37 Wn.2d 533, 534 (1950) (same); *Veach v. Culp*, 92 Wn.2d 570, 572 (1979 (same); *Roeder Co. v. Burlington Northern, Inc.*, 105 Wn.2d 567, 572 (1986) (same); *King County v. Squire*, 59 Wn. App. 888, 890 (1990) (same), *rev. denied*, 116 Wn.2d 1021 (1991).

Brown merely follows and applies this long line of precedent. The Hilchkanum deed fits squarely within the easement line of cases since it expressly conveys a right of way and does not convey a "strip of land" or similar reference.

(b). Clause Describing the Location of the Right

Since the Hilchkanum granting clause conveys a "right of way" and not a strip of land, the County attempts to shift this Court's focus to the second paragraph of the deed. *See* County's

Motion for Summary Judgment at 7:18-21. The second paragraph describes where the right of way was intended to be located as it passes through Hilchkanum's property. The County apparently believes that by providing a definite **location** of the right of way, the Hilchkanum deed has somehow conveyed a strip of land in fee.

The County has misunderstood the respective roles of the granting clause and the property description clause (describing the location). Of course, the granting clause controls the type of interest conveyed. Even the County's witness, Neil DeGoojer agreed as follows:

> Q. Is it a correct understanding that the granting clause would govern the interest that was granted, as opposed to the mere description of the property?
> A. Yes.

Deposition of DeGoojer at 34:24-25 and 35:1-2 (excerpt at Exhibit A to Second Declaration of John M. Groen).

Of course, it is good practice to describe where an easement is located. As Professor William Stoebuck explains in the Washington Practice Manual:

> A chronic problem with easement deeds is that they fail to describe adequately the area the easement covers. Area covered should be described with the same care as would a deed conveying title to land by metes and bounds; a surveyor should be able to take the deed and run out the course of the easement.

17 Wash. Prac., Real Estate: Property Law § 2.3 (Updated by 2001 Pocket Part). Of course, that is what the Hilchkanum deed does by providing a definite description of where the right of way easement is to be located. Obviously, by providing a location of the easement, the parties in no way have indicated an intent to convey the land itself. *See also Zobrist v. Culp*, 18 Wn.App. 622, 630 (1977) (setting out exact boundaries did not alter intent that right of way was easement).

It is worth further noting that even the language of the Hilchkanum property description clause does not purport to convey "land." The deed states:

> Such **right of way** strip to be fifty (50) feet in width on each side of the centerline of the railway track as located across our said lands by the Engineer of said railway Company which location is described as follows to wit …

(Emphasis added). As with the granting clause, this language refers to a right of way, not a strip "of land." The County's witness eventually agreed in deposition that nowhere in the Hilchkanum deed does the language purport to convey a "strip of land."

> Q. Is there any reference in this deed to a strip of land?
> A. (Perusing.) No.

Deposition of DeGoojer at 30:17-19 (excerpt at Exhibit 1 to Groen dec.).

In short, neither the granting clause nor the property description clause supports the County's contention that a definite "strip of land" was conveyed by Hilchkanum.

(c). The Location of the Tracks Confirms that a Definite Strip of Land Was Not Conveyed

As mentioned above, King County argues that the Hilchkanum deed conveys a definite strip of land in fee. Of course, as an alleged fee conveyance, the Statute of Frauds requires that the fee property be identifiable at the time of execution of the deed. *Bigelow v. Mood*, 56 Wn.2d 340, 341 (1960) ("deed for conveyance of land must contain a description sufficiently definite to locate it without recourse to oral testimony"). This requirement can certainly be satisfied by the survey call that appears on the second page of the Hilchkanum deed.

However, despite providing a precise location for where the tracks were supposed to be located, the undisputed fact is that the tracks were not built within the area described in the Hilchkanum deed. Stipulation at 2:7-10 ("the railroad track as constructed through Plaintiffs' parcel is not within the area described by the distance call stated in the Hilchkanum deed").

In addressing this problem, King County necessarily argues that the railroad company was not required to build the tracks within the area described by the survey call. According to the County, wherever the railroad ended up building the tracks, such location would be the controlling location for the right of way. In other words, the deed conveyed a right to build the tracks "somewhere" through the property. The deposition of Neil DeGoojer is again revealing. See generally DeGoojer deposition at 36-39 (excerpt at Exhibit __ to Groen dec.).

> Q. What did you mean by use of the term "somewhere"?
> A. Well, the granting clause allows the railroad to construct within a 100 foot strip somewhere within Hilchkanum's property.
> Q. Is that it?
> A. Yeah.

DeGoojer deposition at 39:17-23.

If the granting clause conveyed a right to lay track "somewhere" through the property, and the railroad was not bound by the specific survey call, the conveyance can hardly be claimed to have been for a definite parcel of land in fee sufficient to satisfy the Statutes of Frauds. The County's position is inherently contradictory.

3. Hilchkanum Deed Language Departs from the Statutory Warranty Form

The language of the Hilchkanum deed includes the "form" of the deed. As will be seen, the deed form underscores that the parties did not intend to convey fee title.

For more than 100 years it has been the law of this State (and Territory) that a deed in statutory warranty form is "deemed" a conveyance of fee simple. As pointed out in *Brown*:

> Since before statehood, the Legislature has provided that deeds patterned after the state statute are deemed to convey fee simple title.

Brown, 130 Wn.2d at 437 n.5, (citing Laws of 1886, § 3, pp. 177-78).

Of course, the deeds in *Brown* were in statutory warranty form. Not surprisingly, this was a significant fact relied upon by the Court in finding the deeds at issue there conveyed fee title.

> We hold the original deeds conveyed fee simple title . . .based on the facts the deeds are in *statutory warranty form* . . .

Brown, 130 Wn.2d at 433 (emphasis added).

Unlike the *Brown* deeds, the Hilchkanum conveyance was **not** in the statutory warranty form. Graddon dec. at 5:13-15. The County argues that being in statutory form is only one factor and that using the statutory form merely creates the presumption of fee simple. County's Motion at 11:2-3. Indeed, the presumption of fee title can be overcome by use of the term "right of way" in the granting clause. That was the case in *Morsbach*.

> [W]here 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, not a fee, *though it be in the usual form of a full warranty deed*.

Morsbach, 152 Wash. at 565 (emphasis added); see also *Roeder*, 105 Wn.2d at 572 (right of way grant is easement even "though the deed is in the usual form to convey a fee title"); *Brown*, 130 Wn.2d at 439 n. 6 (same). With Hilchkanum, the case for easement is that much stronger because the granting clause conveys a right of way for a specific purpose **and** the deed is not in the statutory form.

By making a deliberate deviation from the statutory deed structure for conveying a fee title, the intent must have been to convey something less than fee. *See* DeGoojer depo. at 44:7-11 (Exhibit 1 to Groen dec.). Ray's expert, Stephen Graddon, agrees with DeGoojer and *Brown* that departure from the statutory warranty form is strong evidence of intent.

> To use a deed with the header "Right of Way Deed" and the *modified clauses departing from statutory warranty conveyance* is strong evidence of intent to provide mere easement benefits. By deliberately using language in the granting clause that does not follow the statutory form, the parties have clearly indicated an intent to not convey fee simple title.

Graddon dec. at 6:6-10 (italics added).

4. The Deed Language Does Not Reserve Rights To Cross the Right of Way

Yet another factor from the language of the deed evidencing intent to convey a mere easement is the lack of any provision reserving to Hilchkanum a right to cross through the right of way. It would be highly unusual for Hilchkanum to grant fee title across his property without reserving a right to cross this fee strip to access all of his property. As stated in *Brown*,

> These provisions secure easements to the *grantors* across land conveyed to Milwaukee, and probably would have been unnecessary had Milwaukee only held rights of way as easements.

Brown, 130 Wn.2d at 442 n.9 (italics in original). In the same manner, Hilchkanum did not need a provision giving him a right to cross the right of way because he still owned the fee title to the land. This omission from the language of the deed is clear evidence that the parties intended the right of way to be a mere easement.

In summary, there are numerous aspects of the deed language that conclusively show the intent of the parties to convey a right of way easement. Under the law of Washington, this deed language must be construed to have limited the conveyance.

B. CIRCUMSTANCES SURROUNDING THE DEED

In addition to the language of the deed, the circumstance surrounding the Hilchkanum deed further confirm that the parties intended to convey a mere easement.

1. Common Understanding of "Right of Way"

The First Edition of Black's Law Dictionary was published in 1891, just 4 years after the Hilchkanum deed was signed. It is a contemporaneous work that provides the common understanding of the term right of way as a servitude or easement.

> RIGHT OF WAY. The right of passage or of a way **is a servitude** imposed by law or by convention, and by virtue of which one has **a right to pass** on foot, or horseback, or in a vehicle, to drive beasts of burden or carts, **through the estate of another**.

Black's Law Dictionary, p.1046 (1891) (emphasis added). The definition continues:

> "Right of way," in its strict meaning, is the right of passage over another man's ground; and in its **legal** and **generally accepted meaning**, in reference to a railway, **it is a mere easement** in the lands of others, obtained by lawful condemnation to public use or by purchase. It would be using the term in an unusual sense, by applying it to an absolute purchase of the fee simple of lands to be used for a railway or any other kind of way.

Id. (emphasis added).

The general rule in construction is that the common and ordinary understanding of terms are used unless the context clearly requires otherwise. See *Strenge v. Clarke*, 89 Wn.2d 23, 28 (1977); *A. Magnano Co. v. Hamilton*, 292 U.S. 40 (1934). Here, the railroad and Hilchkanum must be understood to have utilized the term right of way as a "mere easement" because that definition, especially with reference to a railway, was the "generally accepted meaning." Indeed, for King County to contend (114 years later) that the parties intended to use the term in some highly specialized, "unusual sense," and thereby cause Hilchkanum to convey away his land, is

ludicrous. There is no basis for believing the parties used that term in any way but the usual sense.

2. If Hilchkanum Conveyed Fee Title, He Would Jeopardize His Entire Homestead Claim

The circumstances surrounding the deed include the fact that in 1887, when Hilchkanum conveyed the right of way, he had not yet received a patent to his homestead claim. Accordingly, under the applicable federal law, Hilchkanum was able to only grant a railroad right of way easement. A grant of fee title to the land would have been a forfeiture of his entire homestead. Under these circumstances, it is untenable to believe that Hilchkanum intended to jeopardize his entire homestead by granting the railroad a right of way deed. The following will explain.

The undisputed facts include that Bill Hilchkanum conveyed a "right of way" by deed dated May 9, 1887. More than one year later, on July 24, 1888, Hilchkanum received a patent to his homestead claim. Declaration of Scott D. Johnson In Support of King County's Motion For Summary Judgment at 3 ¶ 7. See also Declaration of Stephen J. Graddon at 10 ¶ 28 ("Hilchkanum's patent remained pending at the time of the right of way conveyance… Hilchkanum's patent was not issued until July 24, 1888").

The purpose of the homestead laws was to provide the exclusive benefit of the claimed land to the homesteader. *Anderson v. Carkins*, 135 U.S. 483, 487 (1890). Accordingly, the homestead law prohibited a claimant from alienating any part of his property prior to receiving the patent.

> [T]he policy of the act of Congress granting homesteads on public lands … is adverse to the right of a party availing himself of it to convey, or agree to convey, **the land**, before he receives the **patent** therefore.

Id. at 489 (emphasis added).

This created a problem for railroads seeking to build new lines in the expanding western states because the prohibition on alienation meant that

> settlers **without patent** were *not in a position to make deeds to rights of way* ... The consequence was that … it was practically impossible to construct railroads through territory which consisted partly of public lands and partly of that which was in possession of settlers.

Minidoka & Southwestern Railroad Company v. United States, 235 U.S. 211, 215-16 (1914) (citations omitted) (emphasis added). Congress recognized this problem and therefore provided a legislative fix.

> [I]n order to meet this difficulty, Congress, on March 3, 1873, passed an act providing that any bona fide settler might convey …

> 'part of his claim for church, school, and cemetery purposes and **for right of way for railroads**.'

Id. at 216 (quoting Rev. Stat. § 2288) (emphasis added). Accordingly, Congress was able to better effectuate its purpose of encouraging the construction of railroads in western territories. Because Hilchkanum had not yet received his patent, it is pursuant to this statutory authority that he was able to convey a right of way to the railroad.

The question then arises whether Congress intended this authority to convey a "right of way for railroads" to mean an easement, or to mean fee title to the railroads. Fortunately, the Supreme Court has provided guidance. In *Great Northern Ry. Co. v. United States*, 315 U.S. 262 (1942), the Court reviewed whether a right of way grant through public lands pursuant to the General Railroad Right of Way Act of 1875 was a mere easement or a fee title. In addressing this issue, the Court explained the purpose of Congress under the Act of 1875 was "to permit the construction of railroads through public lands." *Id*. at 272. The Court further reasoned:

> The achievement of that purpose does not compel a construction of the right of way grant as conveying a fee title to the land … a railroad may be operated though its right of way be but an easement.

Id. The Court ultimately held the "Act of March 3, 1875, from which petitioner's rights stem, clearly grants only an easement, and not a fee." *Id*. at 271.

Significantly, in reaching this conclusion, the Supreme Court explained that in 1872 the prior policy of lavish grants to railroads had come under criticism and the policy shifted in favor of public lands to homesteaders.

> Beginning in 1850 Congress embarked on a policy of subsidizing railroad construction by lavish grants from the public domain. This policy incurred great public disfavor which was crystallized in the following resolution adopted by the House of Representatives on March 11, 1872: 'Resolved, that … granting subsidies in public lands to railroads and other corporations ought to be discontinued, and that every consideration of public policy and equal justice to the whole people requires that the public lands should be held for the purpose of securing homesteads to actual settlers…'

Id. at 273, (quoting Cong. Globe, 42d Cong,. 2d Sess,. 1585 (1972)). In following this Congressional policy, the Supreme Court reasoned:

> Since it was a product of the sharp change in Congressional policy with respect to railroad grants after 1871, it is **improbable** that Congress intended by it to grant more than a right of passage.

315 U.S. at 275 (emphasis added).

Significantly, it is equally improbable that Congress in 1873, shortly after adopting the House Resolution, would have intended the new authorization allowing homesteaders without a patent to convey a "right of way for railroads" to mean anything more than a right of passage. As stated in the House Resolution, "every consideration of public policy … should be held for the purpose of securing homesteads." Of course, if the term "right of way for railroads" is construed to mean a conveyance of fee title, that portion of the homestead is no longer available for the exclusive use and benefit of the homesteader. The only interpretation of this authorization that is consistent with Congressional policy after 1871, and consistent with the Act of 1875, is for the same term in 1873 to be similarly interpreted as referring to an easement only.

The Department of Interior has also issued a Public Lands Decision that is directly on point. In *South Perry Townsite v. Reed*, 28 Pub. Lands Dec. 561 (1899), the agency considered whether an unpatented homesteader's grant to a railroad of a right of way for stock yards was a prohibited alienation. The deed language stated: "as and for a right of way upon which to construct and maintain stock yards." *Id*. at 561. The Department ruled:

> The words "for the right of way of railroads," as used in section 2288 of the Revised Statutes, are not limited to the width of the track and cars, but include such space as is necessary for side tracks, stock yards, or other purpose incident to the proper business of a railroad as a common carrier.
>
> The deed in this case provides for the **reversion of the land to Reed** should the railroad cease to use it for the purpose for which the purchase was made. The deed does not vitiate Reed's entry.

28 Pub. Lands Dec. at 562 (emphasis added). Accordingly, while the activities allowed within the "right of way" are broad and include stock yards, the decision clearly requires the right of way to **not be** conveyed as **fee title** but must be a right of way with reversionary rights retained by the homesteader—*i.e*. a mere easement. *See also, Lawson v. Reynolds*, 28 Pub. Lands Dec. 155, 159-60 (1899) (grant of an easement is no bar to consummation of homestead entry).

Clearly, the statutory authority for Hilchkanum to convey a right of way was limited to allowing conveyance of an easement. Conveyance of a fee estate would have jeopardized Hilchkanum's entry on the land as a homesteader. Obviously, as a homesteader, Hilchkanum would never have intended to lose his claim by conveying a fee title to the railroad. These circumstances show that Hilchkanum must have intended to convey a mere easement, a right of way as that term was commonly understood. *See also* Graddon dec. at 9 ¶ 27 and exhibits 5, 18 and 24 thereto (referring to George Davis).

> In my opinion, this evidence is strong additional indication that Davis and Hilchkanum did not intend to convey their lands in fee simple absolute. Since the identical language was utilized in the Hilchkanum deed, and both deeds were executed at the same time and for the same purpose, it is reasonable to conclude that the same

> intent was understood by Hilchkanum as by his neighbor George Davis.

Graddon dec. at 9:19-23.

3. The Burke Deed Further Confirms that An Easement Was Intended to be Conveyed

Ironically, Thomas Burke, the primary promoter of the railroad, happened to be a property owner from whom the railroad company needed to secure a right of way. Burke executed his "Right of Way" deed to the railroad on September 6, 1887, shortly after Hilchkanum's deed. Ex. 22 to Graddon dec. Not surprisingly, the key language of the granting clause in Burke's deed is **identical** to the granting clause language of the Hilchkanum deed. *See Northlake Marine Works v. City of Seattle*, 70 Wn.App. 491, 494 (1993).

> In consideration of the benefits and advantages to accrue to us from the **location construction and operation** of the Seattle Lake Shore and Eastern Railway in the County of King in Washington Territory we do hereby remise release and forever quit claim unto said Seattle Lake Shore and Eastern Railway Company **a right of way** one hundred (100) feet in width through our land in said County described as follows …
>
> **Such right of way** strip to be fifty (50) feet in width on each side of the centerline …

Ex. 22 to Graddon dec. *See also Northlake Marine Works v. City of Seattle,* 70 Wn.App 491, 494 (1993) (readable version of Burke deed).

Before proceeding further, the Court must understand the function of the "habendum clause" that typically appears at the end of a deed. The habendum clause states the extent of the ownership in the thing granted. Black's Law Dictionary, 4th Edition, 1951 at 838. The habendum clause cannot alter or contradict the interest that was conveyed clause, but may explain or qualify the estate conveyed by the granting clause. *Id*. *See also Hay v. Chehalis Mill Company*, 172 Wash. 102, 108 (1933) "wording of habendum clause must give way to the manifest intention clearly expressed by the terms of the deed as a whole").

Thomas Burke, an attorney, used the habendum clause to clarify his intent regarding the granting clause in his deed. Burke's habendum clause includes the statement that "if it should cease to be used for a railway the said premises shall revert to said grantors, their heirs, executors, administrators or assigns." Exhibit 22 to Graddon dec.

Thomas Burke's deed was construed by the Washington Supreme Court in *Pacific Iron Works v. Bryant Lumber*, 60 Wash. 502, 505 (1910). The Court had no difficulty holding that Burke's deed conveyed an "easement and nothing more." *Id*. at 506.

> [W]hen the instrument is construed as a whole and **in light of the purpose for which the grant was made**, it is a grant of a right of way or easement and nothing more.

Id. (emphasis added). In other words, despite purporting to be a quit claim deed, which normally would convey all interest in the identified property, the Court recognized that the clear purpose of Burke's deed was for a right of way for the railroad. Of course, that purpose was identical to Hilchkanum—both deeds were for the express purpose of locating, constructing and operating a railroad. Moreover, both expressly stated in the granting clause that a "right of way" was being conveyed. As highlighted by the Court in *Pacific Iron Works*:

> The grant of a **right of way** to a railroad company is the grant of an easement merely and the fee of the soil remains in the grantor.

Id. at 506 (emphasis added) (quoting 14 Cyc. 1162; *Robinson v. Missisquoi R. Co.*, 59 Vt. 426, 10 Atl. 522.)

King County would argue that Burke's habendum clause is sufficient to distinguish Burke's intent from Hilchkanum's intent. But that distinction cannot pass scrutiny. Remember, the habendum clause cannot alter the interest conveyed by the granting clause, it merely defines or sets forth that interest. Because Burke and the railroad (of which he was an officer)[1] agreed to the habendum language, this can only mean that Burke and the railroad agreed that the **intent of the granting clause** was to convey a mere easement. That was the ready conclusion of the Washington Supreme Court.

To rule that the identical granting clause language for Hilchkanum did not carry that same intent would be tantamount to ruling that Burke and his railroad company actually sought to take advantage, deceive, and defraud Hilchkanum out of his property. Remember, Hilchkanum was illiterate. Graddon dec. at Exhibits 6 and 7. He relied on others to tell him what a document meant. *Id.* Moreover, one of the persons who apparently fulfilled that explanatory role was David Denny. *Id.* Mr. Denny was a witness to the execution of Hilchkanum's deed and he held possession of Hilchkanum's real estate papers. *Id.* Of course, Denny had a clear conflict of interest since he was also one of Burke's co-founders of the railroad.

Under these circumstances, if this Court were to rule that Hilchkanum conveyed fee title to his land, while Burke conveyed a mere easement, *even though the key terms of the granting clauses are identical*, serious concerns would be raised as to whether the whole Hilchkanum transaction should be declared illegal as a result of undue influence, misrepresentation, or outright fraud. Hilchkanum's inability to read and write, or anticipate whatever hairsplitting legal arguments might be advanced 114 years later by King County, should not allow the railroad (or its successor) to take advantage of him.

The truth—the reality—is that both Hilchkanum and Burke conveyed a "right of way" for specific railroad purposes. Hilchkanum can only be charged with understanding the commonly accepted meaning of the term "right of way." The words of the Washington Supreme Court seem particularly applicable:

> It would not be fair to assume that, under the guise of procuring simply a right of way, the railway company intended by the use of these words to take a conveyance in fee simple.

Morsbach, 152 Wash. at 569-70 (quoting *Lockwood v. Ohio River R. Co.*, 103 F. 243 4th Cir.).

Finally, the fact that Hilchkanum's deed did not contain a habendum clause with the express words of reversion is not detrimental to understanding the intent as expressed in the granting clause. In *Morsbach*, the habendum clause was broad and general, stating:

> To have and to hold the general premises with the privileges and appurtenances thereto belonging to the Northern Pacific Railroad Company, its successors and assigns, to their use and behoof forever.

Morsbach, 152 Wash. at 565. The habendum clause in Hilchkanum's deed is virtually identical, stating:

> To have and to hold the said premises with the appurtenances unto said party of the second part and to its successors and assigns forever.

In *Morsbach*, the Court concluded that the use of the term right of way in the granting clause meant that a mere easement was intended to be conveyed. The use of the general and broad habendum clause did not alter that intent. The same must be true with respect to Hilchkanum's deed.

To conclude this point, attention is directed to *Veach v. Culp*, 92 Wn.2d 562 (1979). The deed there utilized a standard habendum clause , stating as follows:

> To have and to hold, all and singular, said premises, together with the appurtenances unto said party of the second part, and to its assigns forever.

Id. at 573. Significantly, the Court rejected the railroad's argument that use of the standard habendum clause language meant that the parties intended to convey fee title. *Id*. at 573-74. Rather, because the granting clause conveyed a "right of way," the Court held that an easement was conveyed. *Id*. The ruling was summarized as follows.

> In *Veach v. Culp*, the court construed a deed which granted a right of way and used the **standard habendum language**, but without the additional language conditioning use of the property on its

> continued use as a railroad right of way. The successor railroad argued that the absence of such limiting language showed a fee was conveyed. The *Veach* court disagreed, holding that the language of the deed which described conveyance of a right of way indicated an easement had been conveyed.

King County v. Squire Investment Co., 59 Wn.App. 888, 894 (1990) (emphasis added).

The intent of Hilchkanum's deed, as evidenced by the granting clause, must be consistent with the matching language in the granting clause of Thomas Burke's deed. The proper application of the law is not in doubt and must be followed by this Court.

4. The Squire Deed

In *King County v. Squire Investment Co.*, 59 Wn.App. 888, the Court had before it another deed to the Seattle Lake Shore and Eastern Railway. This deed was dated March 29, 1887 and contains the **exact same granting clause** as Hilchkanum's deed. Compare *id*. at 890 (reciting granting clause) with Hilchkanum. In *Squire*, the appellate court followed the rule from *Morsbach*, *Swan* and *Veach* and found that the granting clause conveyed a mere easement. *Id*. at 893-94.

As with the Burke deed, King County attempts to distinguish this result by pointing out that the habendum clause in *Squire* had additional handwritten language providing "so long as said land is used as a right-of-way." As with Burke, the clarifying language in the habendum clause does not alter the intent of the granting clause—it confirms that intent.

Like Burke, Watson Squire was an attorney and the territorial governor of Washington in 1887 when the deed was given to the railroad. C. Bagley, 3 History of Seattle 509 (1916); *see also* Exhibit B to Second Declaration of Groen. The appellate court correctly concluded that the handwritten insertion of clarifying language by Watson Squire did not alter the intent of the granting clause, but merely precluded any misconstruction in the future by other people.

> Since the language in the granting clause strongly suggests conveyance of an easement, however, we find it more plausible that the "so long as" language was inserted by Squire to preclude the claim that he conveyed a fee simple to the railroad.

Squire, 59 Wn.App. at 894.

The granting clause in *Squire* was identical to Hilchkanum's granting clause. The clause therefore must be construed to have the same intent. That intent was clarified by Watson Squire, accepted by the railroad, and ruled on by the appellate court as showing a mere easement was conveyed. Under these surrounding circumstances, it would be **unconscionable** for this Court to ignore controlling law and rule that while railroad promoter Thomas Burke (who also in 1889 became the Chief Justice of the Territorial Supreme Court (1 Wash. Rpts., Kreider)) and that Watson Squire, Territorial Governor, conveyed mere easements whereas, Bill Hilchkanum, a

Native American who could not read or write, conveyed away fee title to his land *even though the identical granting clause language was used in all three deeds*.

C. SUBSEQUENT CONDUCT OF THE PARTIES

Turning to the final factor for determining intent, the subsequent conduct of the parties also confirms that only a right of way easement was granted. The subsequent deeds by Hilchkanum, and referred to by the County in Exhibit 5 of Johnson's declaration except the railroad right of way from the operation of the deed. The deeds, in order as set forth in Johnson's Exhibit 5, refer to the right of way with the following phrases: "right of way of railroad;" "right of way of Rail Road;" "for right of way purposes;" and "right of way." Contrary to the argument advanced by King County, these references are consistent with the intent of the original granting clause that created the easement.

By including the right of way exception, the correct construction is that Hilchkanum was acknowledging that the right of way easement had been previously conveyed and that the new purchaser of Hilchkanum's fee title would remain subject to the right of way easement. As ruled in *Zobrist v. Culp*,

> The conveyance of a fee simple interest with a clause excepting an easement previously deeded to a third party, therefore, conveys to the grantee all the grantor's rights and interests in the land, yet compels the grantee to refrain from acting in a manner inconsistent with the rights of the third party.

18 Wn.App. at 629. Accordingly, these subsequent conveyances are consistent with intent to convey an easement.

In summary, the language of the deed, the circumstances surrounding the deed, and the subsequent conduct of the parties all demonstrate that Hilchkanum only intended to convey a right of way easement and that he retained fee title. Summary judgment should be denied to King County, and title to the fee should be quieted in Ray as Hilchkanum's successor.

II.

THE DEEDED RIGHT OF WAY HAS BEEN ABANDONED

The next question is to determine the location of the easement and its present status. With respect to identifying the location of the easement, the deed states on the bottom of the first page as follows:

> Such right of way strip to be fifty (50) feet in width on each side of the center line of the railway track as located across our said lands by the Engineer of said railway Company **which location is described as follows** to wit:

The deed then continues on the second page to provide a precise survey description of the location of the right of way. The County's expert, Neil DeGoojer affirmed in deposition that

> the legal description on the second page is what provides the actual location of where the parties intended the right of way to be.

DeGoojer at 33-34 (Exhibit 1 to Groen dec.).

The problem is that the railroad tracks were in fact **not** constructed within the area intended by the parties as described by the survey call. Indeed, the tracks, as they pass through Ray's property are *entirely outside of the deeded right of way*. Stipulation at 2:7-9.

Where, as here, the deed provides a survey call that specifically defines where the tracks were to be located, the language of the deed controls. Directly on point is *Aladdin Petroleum Corporation v. Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818 (1977). In that case, an easement was granted with a specific call as to its location. 561 P.2d at 821. The court set forth the following:

> The law appears to be settled that where the width, length and location of an easement for ingress and egress have been expressly set forth in the instrument the easement is specific and definite. The expressed terms of the grant or reservation are controlling.

561 P.2d at 822. *See also* Real Property Deskbook, Second E. (1986), Vol. 1, § 15.28 (specific terms control).

The County contends that the tracks themselves are a "monument" for locating the right of way and that when in conflict, a monument controls over a survey call. The County relies upon *DD&L, Inc. v. Burgess*, 51 Wn.App. 329 (1988). Ray agrees with the general rule that a monument will control over courses and distances if they are inconsistent. *Mathews v. Parker*, 163 Wash. 10, 14 (1931). However, that rule has no applicability to the Hilchkanum deed. The Court is invited to read closely the language describing the location of the right of way. This is not a case where a preexisting monument and a distance call are in conflict. This is a situation where a structure (the tracks)built after the deed issued, which the County calls a monument, was specifically directed to be built in a certain, identifiable, specific location. Nothing in the deed suggests that the railroad had any right to select an alternative location outside of the area described by the survey call. To allow a realignment of the right of way would ignore the clear intent of the parties in defining where the tracks were to be located.

Obviously, the actual right of way easement as described in the survey call of the deed has never been utilized by the railroad. After 114 years, it is clear that the railroad abandoned that easement long ago.

What interest then is held by the railroad as to the actual location on the ground where the tracks were constructed. Washington law requires easement interests to be created by deed. *Ormiston v. Boast,* 68 Wn.2d 548, 550 (1966). Here, there is no other deed granting an easement in the location where the tracks were actually constructed. Accordingly, the only alternative is that the railroad acquired a prescriptive use easement. *Id.* at 551. Under Washington law, the width of

that easement would be the area actually used by the railroad. *Northwest Cities Gas. Co. v. Western Fuel Co.,* 17 Wn.2d 482, 487 (1943). It is undisputed that the width is approximately 10 feet. Declaration of Ray.

In short, the original right of way easement specifically described in the Hilchkanum deed has been abandoned. There has been no subsequent conveyance of an easement by written deed. Accordingly, at best, the railroad may have established a prescriptive use easement through Ray's parcel. That easement is approximately 10 feet wide.

CONCLUSION

Ray respectfully requests that the County's Motion for Summary Judgment be denied and that summary judgment be granted in favor of Ray, thereby declaring that the Hilchkanum deed conveyed a mere right of way easement and quieting title to the fee simple estate in Ray.

Ray further requests the Court declare the right of way described in the Hilchkanum deed to have been abandoned. Although plaintiffs acknowledge that a ten foot wide prescriptive use easement can likely be established, the County has not sought such relief in its pleading.

DATED this 13th day of August, 2001.

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[1] *See* Graddon dec. at 6:13-17.