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State of Washington
Opinion Information Sheet

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Title of Case: Gerald and Kathryn Ray, Appellants V King County, Respondent
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SOURCE OF APPEAL

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Date filed: 08/24/2001
Judge signing: Hon. Carol Schapira

JUDGES

Authored by Ronald E. Cox
Concurring: Ann Schindler
Dissenting: William W. Baker

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Ray v. King County
No. 50105-4-I

BAKER, J. **(dissenting)** - The majority concludes that the 1887 right of way deed between Bill Hilchkanum and Seattle Lake Shore and Eastern Railway conveyed fee title. For a number of reasons I disagree, and conclude that the deed only conveyed an easement.

First, contrary to the majority's conclusion, the evidence establishes that the handwritten deed was drafted by the railroad, and must therefore be construed against it. As King County concedes, Hilchkanum did not write the deed. Extrinsic evidence also supports concluding that the deed must be construed against the railroad. The language contained in the handwritten deed is identical to language used on pre-printed forms produced by the railroad. Hilchkanum's attorney, who signed as a witness, was an owner of the railroad. The Rays also provided an affidavit from their expert opining that the deed was drafted by the railroad.

The majority also mistakenly concludes that the Hilchkanum deed conveyed a strip of land.1 But the deed expressly states that 'we do hereby donate grant and convey . . . a right of way one hundred (100) feet in width through our lands . . . .' The term 'right of way strip' is found only in the legal description, not in the granting provision.

The majority points to certain subsequent conduct by Hilchkanum to support its conclusion that he intended to convey fee title to the railroad. But these subsequent conveyances only establish that Hilchkanum understood that the railway had a right of way across his lands. The majority ignores other conveyances by Hilchkanum which indicate that he only intended to convey an easement to the railroad.

When the language of the deed is properly construed against the railroad, the granting clause conveys only a right of way.

Language in the deed must be construed against the railroad

It is a well established principle that ambiguity must be construed against the grantor.2 But as we explained in Harris v. Ski Park Farms, Inc.,3 when the grantee drafts the deed, this rule does not apply.4 Hilchkanum was illiterate and the handwritten deed contained identical language to that found in a contemporaneous pre-printed deed bearing the railroad's name. The Rays also submitted an affidavit from an expert who opined that 'given

the use of pre-printed deeds, and given Hilchkanum's illiteracy, there appears no doubt that Hilchkanum did not draft the deed; but rather, it was the product of the railroad company.'

The majority states that because Hilchkanum must have understood the nature and extent of his conveyance, the fact that the deed was handwritten by someone else is of no consequence. And the majority holds that because there is nothing in the record indicating that the drafter was an agent of the railway, Hilchkanum must have been the drafter. This conclusion wrongly focuses on the identity of the grantor instead of the identity of the drafter of the deed. It is undisputed that the deed's language was taken from the railroad's standard deed. And the affidavit by the Rays' expert creates a material question of fact concerning who actually drafted the document. Taking this affidavit in a light most favorable to the Rays as the nonmoving party, any ambiguities in the deed must be construed against the railroad.5

Hilchkanum's use of the term 'right of way' granted only an easement Washington courts have given special significance to the words 'right of way' in railroad deeds, explaining that the term 'right of way' generally creates only an easement when used 'as a limitation or to specify the purpose of the grant.'6 In fact, most Washington cases have construed 'right of way' language in such instruments as granting only an easement to the railroad.7

The majority discounts Veach v. Culp8 because it did not consider the full range of factors later articulated in Brown v. State.9 But Brown cites Veach with approval. The majority's selective reading of our Supreme Court's precedent is unsupported by the Brown decision.

Veach clarified the rule set forth in the earlier case of Morsbach v. Thurston County,10 that merely using the term 'right of way' in a granting clause is enough to establish that the original grantor intended only to convey an easement.11 In Brown, our Supreme Court explained this holding by stating that a 'deed in statutory form grants {an} easement where additional language in the deed expressly and clearly limits or qualifies the interest granted.'12

Conversely, when the deed contains no language 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.13 Here, Hilchkanum did explain the purpose of the grant ('the location construction and operation of the Seattle Lake Shore and Eastern Railway') and limited

the estate conveyed ('we do hereby donate grant and convey . . . a right of way').

The majority opinion extensively analyzes various factors discussed in Brown, and concludes that conveyance of fee simple title was Hilchkanum's intent. But in Brown, the court analyzed prior case law and noted that 'use of the term 'right of way' as a limitation or to specify the purpose of the grant generally creates only an easement.'14 That term is used in the deed in question, both in its title and in its granting clause. In contrast, the deeds considered in Brown expressly conveyed fee title to definite strips of land. No such language appears in the Hilchkanum deed's granting clause. Further, although the deed does not explicitly limit the grant to railroad purposes, the consideration recited immediately above the right of way grant does state that to be the purpose of the deed. The majority ignores this language when concluding that there is nothing in the deed limiting the grant to operating a railroad.15

For example, in Swan v. O'Leary,16 the deed stated that the conveyance was 'for the purpose of a Railroad.'17 And in Morsbach, the deed explained that the right of way was 'for the construction of said company's railroad.'18 Here, although there are no explicit words limiting the right of way to railroad use, the Hilchkanum deed does explain that the purpose of the grant was for 'the location construction and operation of the Seattle Lake Shore and Eastern Railway.'

A reversionary clause in not necessary to convey only an easement

The majority places great emphasis on the absence of a reversionary clause in the subject deed. But a railroad right of way deed need not contain a reverter clause to effect an automatic reversion to the grantor upon abandonment.19 As Hanson Industries, Inc. v. County of Spokane20 notes, railroad rights of way expire automatically upon abandonment.21 And in Veach, our Supreme Court found that a railroad owned only an easement, despite the absence of a limiting or reversionary clause.22 The Veach court explained that language intending to limit the grant was only 'one element in examining the whole of the deed.'23 Instead, the court focused on the use of 'right of way' in the granting clause, and concluded that the original grantor intended to limit the right of way to only an easement.24 In King County v. Squire Inv. Co,25 we noted that the phrase 'so long as' in the habendum arguably suggested conveyance of a fee simple determinable.26 But because language in the granting clause strongly suggested conveyance of an easement, we concluded that Squire had instead inserted this language to clarify that he was granting an easement.27

And in Hanson Industries, Division Three also found an easement despite the absence of a limiting or reversionary clause.28 As a recent article explains, a reversionary clause is not necessary to conclude that the landowner only granted an easement:

> If a railroad acquired a perpetual or general easement, then the easement exists in perpetuity, regardless of whether or not the company operates a railroad on the land. These rare perpetual or general easements are found only where no language in the grant specifies the type of use the railroad may make of the land.{29}

It is clear that the Hilchkanum deed did not include a reversionary clause. But contrary to the majority's interpretation of the Brown decision, this does not necessarily mean that Hilchkanum intended to convey fee title.30 As Wright and Hester explain, the fact that a grantor (Hilchkanum) did not limit the right of way to railroad use may only serve to make the grant an unconditional easement.31

Absence of exceptions or reservations is indicative of intent to grant an easement

Another important factor in the Brown deeds was the presence of reservations by the grantors. The court found these significant in establishing that the railroad had obtained fee simple title, because had the railroad only obtained an easement, the grantors would not have needed to explicitly reserve access crossings and irrigation ditches:

> Several of the deeds reserve or except the right of the grantor to make some use of the land conveyed . . . . The reservation or exception of mineral or irrigation rights is consistent with the conveyance of a fee; it would not have been necessary to reserve such rights had the parties intended an easement because the grantors would have retained use of the land. Similarly, the obligation to construct or maintain farm crossings or irrigation channels is consistent with the conveyance of fee simple title. These provisions secure easements to the grantors across the land conveyed to Milwaukee, and probably would have been unnecessary had Milwaukee only held the rights of way as easements.{32}

The Hilchkanums made no exceptions in their deed even though the granted right of way bisected their land. The majority fails to acknowledge that this factor supports concluding that Hilchkanum only granted an easement. Language in Hilchkanum's deed conveying the right to cut dangerous trees is not evidence that Hilchkanum intended to grant fee title

The majority also holds that the 'dangerous trees' easement supports concluding that the right of way deed granted fee title because the easement grant is more limited than the right of way grant in the same deed. Specifically, the deed grants the railway the right to 'go upon the land adjacent to said line. . . and cut down' dangerous trees within 200 feet of the centerline of the track.

But railroad corporations were prohibited from appropriating rights of way wider than 200 feet.33 The railroad's right to cut trees extended outside of the right of way area allowed by the territorial code because the easement allowing the railroad the right to cut trees was distinct from its right of way. This secondary access grant was not exclusive, as the right of way was, and terminated if the railroad use terminated, whereas the railroad right of way was exclusive and akin to a street right of way.

Subsequent behavior by the parties is inconclusive to show intent

The majority also concludes that subsequent behavior by the parties supports a conclusion that the deed conveyed fee title.34 The majority focuses on three subsequent deeds that acknowledge the presence of the railroad right of way, while ignoring an earlier deed that does not make any such reservations. The majority justifies this by explaining that Hilchkanum's failure to reserve the right of way is not probative of whether or not the parties intended to convey a fee simple estate.35 But we should not selectively emphasize Hilchkanum's subsequent conveyances. Instead, we should conclude that the subsequent behavior of the parties does not aid our inquiry because it does not conclusively show that Hilchkanum intended to convey either an easement or fee title.

Moreover, Hilchkanum granted the deed omitting reference to the right of way in 1890, just three years after granting the railway right of way. The deeds that the majority focuses on were granted much later Hilchkanum's grant to his wife was 11 years after the railway grant, and the other two several years after that. While this is not conclusive evidence of Hilchkanum's intent, it is interesting that the deed closest in time to the subject conveyance omitted any reference to the railroad right of way. If that right of way was owned in fee by the railroad, the omission was strange indeed.

The majority concludes that the three later deeds show that Hilchkanum intended to convey the right of way as fee, and not as an easement. But if Hilchkanum had conveyed a fee to the railroad, he would not have used the term 'right of way' and instead would have simply indicated that the land

itself was previously conveyed to the railroad.

The second deed that the majority relies upon also uses the term 'right of way,' but as a point of reference forming one border of the property. Use of the term 'right of way' in this manner has no bearing on whether Hilchkanum believed he had conveyed an easement or fee.

As with street easements, although the abutting owner might refer to the boundary as the adjacent street, this does not necessarily mean that the abutting owner does not also own to the centerline of the street. Because railroad easements like street easements are exclusive, referencing them in the deed as a right of way does not establish that the owner transferred fee title to the railroad.

I acknowledge that in King County v. Rasmussen,36 a federal district court interpreted the Hilchkanum deed and held that it conveyed fee simple title to the right of way.37 On appeal, the Ninth Circuit recognized that the term 'right of way' appeared in the Hilchkanum deed's granting clause as well as in the legal description. But the court did not find the phrase determinative of intent, because the language did not clearly limit the use of the land to a specific purpose.38 The court went on to explain that in 'virtually all cases' finding that the term 'right of way' only granted an easement, the granting or habendum clause contained language clearly limiting the use of the land to a specific purpose.39 The court concluded that Hilchkanum's deed did not restrict the conveyance by designating a specific purpose, limiting use of the land, or adding a reversionary clause.40 Noticeably absent from the court's discussion on this issue was any reference to Veach.

On appeal, the Ninth Circuit distinguished Veach on the basis of (1) other language in the Hilchkanum deed and (2) extrinsic evidence indicating an intent to convey a fee simple estate, neither of which was present in Veach.41 For reasons discussed above, I disagree with the Rasmussen court's analysis.

Conclusion

Use of the term 'right of way' in the granting clause of the Hilchkanum deed did not conclusively establish that Hilchkanum only granted the railroad an easement. But because Washington courts give great weight to the term 'right of way' when it is used in the granting clause, and nothing else establishes that Hilchkanum instead intended to grant the railroad fee

title, I conclude that the conveyance granted only an easement. I therefore dissent.

1 Majority Op. at 12.

2 Hodgins v. State, 9 Wn. App. 486, 492, 513 P.2d 304 (1973).

3 62 Wn. App. 371, 814 P.2d 684 (1991), aff'd, 120 Wn.2d 727, 844 P.2d 1006 (1993).

4 Harris, 62 Wn. App. at 376 (holding that rule that ambiguities in deed are to be interpreted most favorably to grantee and most strictly against grantor did not apply where alleged ambiguity arose in language incorporated in deed from purchase and sale agreement drafted by grantee); see also Hanson Indus., Inc. v. County of Spokane, 114 Wn. App. 523, 531, 58 P.3d 910 (2002) rev. denied, 149 Wn.2d 1028 (2003) (recognizing that ambiguities must be construed against railroad because it drafted deed).

5 See Hanson Indus., 114 Wn. App. at 531.

6 Brown v. State, 130 Wn.2d 430, 439, 924 P.2d 908 (1996).

7 See, e.g., Roeder Co. v. Burlington N., Inc., 105 Wn.2d 567, 569, 716 P.2d 855 (1986) (holding that deed granted an easement based on the specifically declared purpose that the grant was a right of way for railroad purposes, and there was no persuasive evidence of intent to the contrary); Morsbach v. Thurston County, 152 Wash. 562, 564, 278 P. 686 (1929) (deed granted 'the right-of-way for the construction of said company's railroad in and over . . . .'); Swan v. O'Leary, 37 Wn.2d 533, 534, 225 P.2d 199 (1950) (granted property 'for the purpose of a Railroad right-of-way . . . .'); Veach v. Culp, 92 Wn.2d 570, 572, 599 P.2d 526 (1979) (granted '{a} right-of-way one hundred feet wide . . . .'). See also Reichenbach v. Washington Short Line Ry. Co., 10 Wash. 357, 358, 38 P. 1126 (1894) ('so long as the same shall be used for the operation of a railroad' construed as granting easement); Pacific Iron Works v. Bryant Lumber & Shingle Mill Co., 60 Wash. 502, 505, 111 P. 578 (1910) (deed providing 'to have and to hold the said premises . . . for railway purposes, but if it should cease to be used for a railway the said premises shall revert to said grantors' grants easement not determinable fee); Hanson Indus., 114 Wn. App. at 536 (holding that right of way deed conveying strip of land over and across grantor's lands conveyed easement); King County v. Squire Inv. Co., 59 Wn. App. 888, 890, 801 P.2d 1022 (1990) (holding that 'grant and convey . . . a right-of-way . . . . To Have and to

Hold . . . so long as said land is used as a right-of-way . . . .' grants easement).

8 92 Wn.2d 570, 572, 599 P.2d 526 (1979).

9 130 Wn.2d 430, 439, 924 P.2d 908 (1996); Majority Op. at 11-12.

10 152 Wash. 562, 565-66, 278 P. 686 (1929).

11 Veach, 92 Wn.2d at 574. In Veach, the court held that the legal description is part of the granting clause. Although Brown appears to contradict this, the court in Brown cited Veach with approval for the proposition that the term 'right of way' in the granting clause limits the estate conveyed. Brown, 130 Wn.2d at 437-38.

12 Brown, 130 Wn.2d at 438 (citing Veach, 92 Wn.2d at 570).

13 Brown, 130 Wn.2d at 439-40 (citing Swan, 37 Wn.2d at 536; 65 Am.Jur.2d Railroads sec. 76 (1972); Urbaitis v. Commonwealth Edison, 575 N.E.2d 548, 552 (1991)).

14 Brown, 130 Wn.2d at 439 (emphasis added).

15 Majority Op. at 12-13.

16 37 Wn.2d 533, 534, 225 P.2d 199 (1950).

17 Swan, 37 Wn.2d at 534.

18 Morsbach, 152 Wash. at 564.

19 Hanson Indus., 114 Wn. App. at 533; Veach, 92 Wn.2d at 572-73; Lawson v. State, 107 Wn.2d 444, 452, 730 P.2d 1308 (1986); see also Morsbach, 152 Wash. at 567.

20 114 Wn. App. 523, 531, 58 P.3d 910 (2002) rev. denied, 149 Wn.2d 1028 (2003).

21 Hanson Indus., 114 Wn. App. at 533 (citing Lawson, 107 Wn.2d at 452).

22 See Veach, 92 Wn.2d at 573 (reciting deed language).

23 Veach, 92 Wn.2d at 574.

24 Veach, 92 Wn.2d at 574.

25 59 Wn. App. 888, 801 P.2d 1022 (1990).

26 Squire Inv. Co., 59 Wn. App. at 894.

27 Squire Inv. Co., 59 Wn. App. at 894.

28 Hanson Indus., 114 Wn. App. at 533.

29 Danaya C. Wright and Jeffrey M. Hester, Pipes, Wires, and Bicycles: Railsto-Trails, Utility Licenses, and Shifting Scope of Railroad Easements From the Nineteenth to the Twenty- First Centuries, 27 Ecology L.Q. 351, 382 (2000).

30 See, e.g., Hanson Indus., 114 Wn. App. at 533 ('A railroad right-of-way deed need not, however, contain a reverter clause to effect an automatic reversion to the grantor upon abandonment') (citing Veach, 92 Wn.2d at 572-73; Lawson, 107 Wn.2d at 452; and Morsbach, 152 Wash. at 567).

31 Even the conclusion that the easement is unconditional is not necessarily true. As Hanson Industries recently explained, 'A railroad right-of-way need not, however, contain a reverter clause to effect an automatic reversion to the grantor upon abandonment.' Hanson Indus., 114 Wn. App. at 533.

32 Brown, 130 Wn.2d at 442 n.9 (citation omitted).

33 Code of 1881, sec. 2456 provides:
Such corporation may appropriate so much of said land as may be necessary for the line of such road or canal, or the site of such bridge, not exceeding two hundred feet in width, besides a sufficient quantity thereof for toll-houses, work-shops, materials for construction, a right of way over adjacent lands to enable such corporation to construct and repair its road, canal, or bridge, and to make proper drains; and in the case of a railroad, to appropriate sufficient quantity of such lands, in addition to that before specified in this section, for the necessary side tracks, depots, and water stations . . . . (emphasis added).

34 King County v. Rasmussen, 299 F.3d 1077, 1087-88 (9th Cir. 2002), cert. denied, 123 S. Ct. 2220 (2003).

35 Majority Op. at 18.

36 143 F. Supp. 2d 1225 (W.D. Wash. 2001) aff'd, 299 F.3d 1077 (9th Cir. 2002).

37 Rasmussen, 143 F. Supp. 2d at 1230.

38 Rasmussen, 299 F.3d at 1086.

39 Rasmussen, 299 F.3d at 1086.

40 Rasmussen, 143 F. Supp. 2d at 1229.

41 Rasmussen, 299 F.3d at 1087 (citing Rasmussen, 143 F.Supp.2d at 1230 n.4).