Did the Hilchkanum deed grant and easement or fee simple title?

Thoughts and Ideas

John Rasmussen April 8, 2001

Background:

Bill Hilchkanum and his wife, Mary, granted a right of way deed to the Seattle Lake Shore and Eastern Railway Company (SLS&E) on May 9, 1887. My wife and I are successors in interest to a portion of the Hilchkanum property, and burdened, in turn, by that right of way deed. If the deed passed an easement to the railroad, my wife and I are the reversionary owners of the land under the right of way and hold fee title subject to the easement. If that deed passed fee title to the railroad, King County now has fee simple title to that land.

SLS&E was formed in 1885 for the purpose of linking Seattle to the outside world by rail.[1] The earliest goal for the new railroad was to build track north from Seattle and link to the Canadian Pacific Railroad at the border. This was accomplished in 1889. In that same period, the rail line was extended from Woodinville, along East Lake Sammamish, to serve a coal operation at the present city of Issaquah. That extension required SLS&E to obtain the right of way deed that is the subject of this lawsuit. The line was then extended east and terminated a short distance past the present city of Snoqualmie. The intention of the founders was to eventually connect to another section of SLS&E that started in Spokane and was extending west to meet the Snoqualmie spur, forming a cross-territory rail line. The hard economic times and national depression of 1893 was a large factor in the SLS&E foreclosure sale to the Northern Pacific Railroad in

[1] This very general history was in most part obtained through a search of http://www.historylink.org. The information sources are documented there.

1896. SLS&E was founded by local businessmen. But, because of a lack of locally available funds, the railway was financed in large part by funds obtained from the East Coast. The local and personal nature of the deed transactions is reflected in the fact that two of the founders of the railroad, G. M. Haller and D. T. Denny, personally witnessed the execution of the Hilchkanum deed. This was a small, local railroad where the founders obtained the deeds from their neighbors, in many cases.

King County has claimed that all the right of way deeds on the Redmond to Issaquah spur granted fee simple title to SLS&E, and that King County now holds that title as successor in interest. However, the county seems to be constantly changing its mind on how much of the right of way land it claims. In my research, I have found two Washington State decisions that held right of way deeds granted to SLS&E were easements, not fee. These deeds were not on the Redmond-Issaquah spur, however. Thomas and Carrie Burke, and Watson and Ida Squire granted those deeds. Further, in the *Lawson* decision, the Washington State Supreme Court made the following observation: "There is a strong argument to be made that Burlington Northern had no interest to convey to the County…" *Lawson v. State*, 107 Wn.2d 444, 458, 730 P.2d 1308 (1986). The *Lawson* properties were located near the present city of Bothell, a short distance from Woodinville and the origin of the spur that extended down East Lake Sammamish. After losing the *Lawson* decision in the Washington State Supreme Court, my understanding is that King County settled the remaining *Lawson* issues out of court, effectively admitting the properties were easements. In my search, I found no decision that has held SLS&E obtained fee simple title to the land under their right of way.

With all of the recorded decisions finding SLS&E obtained only easements, King County claims that *all*, or at other times, *most* of the SLS&E right of way deeds along East Lake Sammamish conveyed fee simple title. Apparently this depends on what week you ask the county. King County makes this claim with the language in the Hilchkanum deed being almost identical to the Burke and Squire deeds, already found to be easements. The absurdity and dishonesty of King County's claim to fee simple title will become more evident in the discussion below.

Did the Hilchkanum deed convey an easement or fee simple title to the railroad?

The county's declaration to King County Superior Court stated its claim to ownership of my right of way land was based on the *Brown* decision, and specifically the Simpson deed within that decision. *Brown v. State*, 130 Wn.2d 430, 924 P.2d 908 (1996) In his brief in support of summary judgment to this Court, Mr. Johnson adds "*Roeder* III" (*Roeder Co. v. K&E Moving*, 102 Wn. App. 49, 4 P.3d 839 (2000) as also controlling. I have read the *Brown* and *Roeder* III decisions, and have also read the citations from those decisions that dealt with the easement-fee issue. Before I saw the Simpson deed from the *Brown* decision, I could clearly see that the critical issue would be if a right of way for railroad purposes was specified in the granting clause of that deed. This issue was also critical in the determination of *Roeder* III. That single issue stood out from my study of *Brown* and the other decisions. The Washington State Supreme Court appears to *elevate* that consideration above all others in the *Brown* decision.

> "We have given special significance to the words 'right of way' in railroad deeds. In *Roeder*, for example, one of the deeds provided, in part, the grantor: 'conveys and warrants unto Bellingham and Northern

Railway Company . . . for all railroad and other right of way purposes, certain tracts and parcels of land. . . .' ***Roeder***, 105 Wn.2d at 569. Recognizing a railroad can hold rights of way in fee simple or as easements, we held the 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. /6 *Roeder*, 105 Wn.2d at 574. We reached the **same result** in ***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***, 37 Wn.2d at 534 (granted property 'for the purpose of a Railroad right-of-way . . .'); ***Veach***, 92 Wn.2d at 572 (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); ***King County v. Squire Inv. Co.***, 59 Wn. App. 888, 890, 801 P.2d 1022 (1990) ('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**), review denied, 116 Wn.2d 1021 (1991).

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. See *Harris*,

120 Wn.2d at 738; *Machado v. Southern Pac. Transp. Co*., 233 Cal. App. 3d 347, 284 Cal. Rptr. 560 (1991)."

Brown v. State, 130 Wn.2d 430, 438-439, 924 P.2d 908 (1996)

The importance of this single issue in construing the Simpson deed is seen again when Justice Sanders describes the mindset of the majority in his dissenting opinion:

"The majority continues down the wrong track by giving "special significance to the words 'right of way' in railroad deeds," Majority op. at 438, finding the *absence of these precise words in these deeds overpowering in significance*." (*Brown v. State*, 130 Wn.2d 430, 453, 924 P.2d 908 (1996))

The importance of the words "right of way" in the granting clause of railroad deeds has been stated repeatedly in Washington State decisions over the last century. I provide, here, citations from several of the significant cases over those years to show that importance.

1910:

"While some of the language contained in the deed might imply such a grant, when the instrument is construed as a whole and in the light of the purpose for which the grant was made, it is a grant of a right of way or easement and nothing more.

'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. Although the language used in the granting part of the deed and in the habendum is appropriate, and that commonly used to convey the fee, yet the clause descriptive of the use to be made of the land may so limit or qualify the grant as to change it from a fee to an easement.' Cyc. 1162; *Robinson v.*

Missisquoi R. Co., 59 Vt. 426, 10 Atl. 522." (*Pacific Iron Works v. Bryant Lumber etc. Co.,* 60 Wash. 502, 506, 111 Pac. 578 (1910)

1929:

"In the *Abercrombie* case, above cited, it was held that, whatever its name, the interest taken was for the use of the right of way, was limited to that use and must revert when the use is abandoned. In that case, the instrument was one in the form of a general warranty describing a right of way of specific width which the grantee afterwards abandoned. The case also contains an exhaustive discussion of the cases generally bearing upon the question of such grants. It is followed by a case note in 6 Ann. Cas., p. 239, supra, among others, citing many cases to the effect that, where a railroad has taken a conveyance expressly granting a right of way, it will be held to have taken an easement merely, and that *a grant of a strip of land to a railroad company "for right of way and for operating its railroad only," conveyed merely an easement*." (*Morsbach v. Thurston County*, 152 Wash. 562, 569, 278 Pac. 686 (1929))

"…we will construe the deed, as the parties evidently intended, as a grant of right of way only, title to which ceased when the railway company abandoned it as a right of way." (*Morsbach v. Thurston County*, 152 Wash. 562, 575, 278 Pac. 686 (1929))

1950:

"We think when the opinion is critically read and considered with the precise question we have before us in mind, it 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, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title.

Applying that principle to the deed before us, we reach the conclusion that a right of way fifty feet in width for railroad purposes was granted over the tract of land first described, and that there was also granted a right of way for the same purpose over the other tract described. It therefore follows that, when the rights of way were abandoned, they reverted to the successors of the original owners of the lands over which they were granted." (*Swan v. O'Leary*, 37 Wn.2d 533, 537, 225 P.2d 199 (1950))

1979:

"Given the language of the deed explicitly describing the conveyance of a right-of-way and given the rule of *Swan v. O'Leary*, supra, and *Morsbach v. Thurston County*, supra, we conclude **the deed conveyed an easement,** not a fee title." (*Veach v. Culp*, 92 Wn.2d 570, 574, 599 P.2d 526 (1979))

1986:

"Since the granting clause of the Improvement Company's deed declares **the purpose of the grant to be a right of way for a railroad, the deed passes an easement,** not a fee.

The conveyance of a right of way to a railroad may be in fee simple or only an easement. /2 Where only an easement for a right of way is concerned, and its use for such purpose ceases, the land is discharged of the burden of the easement and the right to possession reverts to the original landowner or to that landowner's successors in interest; the right to possession does not go to grantees and successors in interest of

the railroad company." (*Roeder Co. v. Burlington Northern*, 105 Wn.2d 567, 571, 716 P.2d 855 (1986))

1990:

"The Squire deed granted a 'right-of-way fifty (50) feet in width through said lands'. This suggests an easement was conveyed. Both King County and Squire note, however, that the habendum clause contains the handwritten language, 'or so long as said land is used as a right-of-way by said railway Company,' which arguably suggests conveyance of a fee simple determinable. If the granting clause merely conveyed the land to the railroad without reference to a right of way, the 'so long as' language would create such a fee. 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, particularly since the habendum clause granted the interest to the railroad and 'to its successors and assigns forever'. The authorities and cases discussed above **clearly support construing the Squire deed as an easement**." (*King County v. Squire Investment Co.*, 59 Wn. App. 888, 894, 801 P.2d 1022 (1990))

1996:

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

2000:

Because the words "right of way" appeared only in each deed's legal description or in the description of the railroad's obligations, instead of

in the granting or habendum clauses, the court concluded that "[u]sed in this manner, 'right of way' merely describes a strip of land acquired for rail lines; it does not qualify or limit the interest expressly conveyed in the granting and habendum clauses." (*Roeder Co. v. K&E Moving,* 102 Wn. App. 49, 54-55, 4 P.3d 839 (2000))

Even a casual examination of the Hilchkanum and Simpson deeds[2] will show that *Hilchkanum grants* a right of way for railroad purposes in its granting clause and *Simpson does not*. Further, the quote directly above from *Roeder* III indicates that the *Roeder* III deeds fail to compare to Hilchkanum in that respect, also. The issue of whether a right of way is granted for railroad purposes in the granting clause is critical to comparing these deeds. It is puzzling that Mr. Scott Johnson did not address this issue in his declaration to superior court, given the importance of this issue in *Brown*. Further, Mr. Johnson makes this statement: "…the language of the Hilchkanum deed does not expressly limit the estate conveyed."[3] Mr. Johnson is incorrect, that is exactly what the Hilchkanum does in the granting clause of the deed. The discussion and analysis of the Hilchkanum deed, presented below, clearly shows that Hilchkanum granted a right of way for railroad purposes in the granting clause of the deed. In my study, I

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[2] The Simpson deed is supplied as Declaration of Scott Johnson in Support of K.C. SJM, Exhibit 4.

The Hilchkanum deed is supplied as the Neil Dogoojer Declaration, Exhibit 1.

[3] See Scott Johnson's Brief in Support of King County's SJM, Page 10.

have not found one deed that has been construed to grant fee simple title with this situation.

In Mr. Johnson's Brief in Support of King County's Motion for Summary Judgment he makes this statement referring to Hilchkanum:

> "Therefore, the description of a definite strip of land and the lack of any expressly limiting language should lead this court to the same conclusion reached by the *Brown* court with respect to the Simpson and other deeds: the Hilchkanum deed conveyed a fee simple interest.
>
> The only relevant distinction between it and the Simpson and *Roeder* III deeds is that the Hilchkanum deed is not in express statutory form of a warranty or a bargain and sale deed."[4]

When the court examines these deeds and applies the established law, it will find this statement is clearly not supported by the facts of the cases. I will discuss the differences between Hilchkanum and Simpson below.

I have addressed the granting clause issue first because *this issue, alone, destroys the county's claim to ownership of my reversionary property.* Other factors go into deciding the easement-fee issue and I outline them below.

***An outline of the factors considered in determining easement or fee title of the right of way*:**

The *Brown* and *Roeder* III decisions are the basis of King County's claim to ownership of my land. The county presents these decisions as controlling. These decisions bring *no new principles* to the process of determining if a right of way deed granted an easement or fee. It might be claimed that *Roeder* III gives much greater emphasis to extrinsic evidence than previous

[4] See Scott Johnson's Brief in Support of King County's SJM, Page 11.

decisions, but every principle stated in these decisions has been brought forward from previous Washington State decisions. In most cases, the principle has been stated time and again in these decisions, spanning many years.

1. The first, and guiding, principle is that the court should ascertain and enforce the intention of the original parties to a deed. To do this, the court should derive the intent from the whole instrument. If ambiguity exists, the court should consider the situation and circumstances at the time of the grant.

> "In general, when construing a deed, the intent of the parties is of paramount importance and the court's duty to ascertain and enforce." *Brown v. State*, 130 Wn.2d 430, 437, 924 P.2d 908 (1996)
>
> "…the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case." *Swan v. O'Leary*, 37 Wn.2d 533, 535, 225 P.2d 199 (1950)
>
> "The intent is to be derived from the whole instrument, and if ambiguity exists, the situation and circumstances of the parties existing at the time of the grant are to be considered." *Zobrist v. Culp*, 95 Wn.2d 556, 560, 627 P.2d 1308 (1981)

2. Since the words "right of way" in a railroad deed have such powerful effect to indicate the intentions of the parties, the courts have been very specific in how those words must be used in the granting clause to effect a limitation on the estate conveyed, and indicate the deed to be an easement.

> "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. *Morsbach*, 152

Wash. at 568; *Harris*, 120 Wn.2d at 737. 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. The Eidal deed, for example, states:

Said Railway Company . . . will permit a telephone wire and an electric light wire to cross its said right-of-way. . . .Before grading is begun Right of way fences shall be built. . . . Said Railway Company is to furnish such facilities for conducting water for irrigation and other purposes under its track and across its Right-of-Way as are reasonable and practicable. . . .Clerk's Papers (*Brown*) at 27.

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 expressly conveyed in the granting and habendum clauses. To point out that the Eidal deed and others describe the property as right of way simply begs the question of what interest Milwaukee acquired, because a railroad can own rights of way in fee simple if that is what the deed conveys." *Brown v. State*, 130 Wn.2d 430, 441-442, 924 P.2d 908 (1996)

"Courts generally recognize that the words 'right of way' have a twofold meaning. They are sometimes used to describe a mere right of passage over a tract, and sometimes to describe the strip of land which railroad companies purchase, or otherwise compulsorily acquire, upon which to construct their railroad." *Morsbach v. Thurston County*, 152 Wash. 562, 568, 278 Pac. 686 (1929)

"There is no question Milwaukee acquired the property for railroad purposes under these deeds. Identifying the purpose of the conveyance, however, does not resolve the issue at hand because a railroad can own rights of way in fee simple or as easements. *Roeder,* 105 Wn.2d at 571; *Harris* 120 Wn.2d at 738. Rather than identifying the purpose of the conveyances, we must conduct a deed-by-deed analysis to ascertain whether the parties clearly and expressly limited or qualified the interest granted, considering the express language, the form of the instrument, and the surrounding circumstances." *Brown v. State,* 130 Wn.2d 430, 440, 924 P.2d 908 (1996)

3. With respect to railroad rights of way, the rules used to construe these deeds have become very specific over the years. Since a railroad may obtain a right of way either by obtaining an easement or by outright purchase of land, the past decisions have detailed the factors to weigh in determining the easement-fee issue. These rules and factors are stated in the citations below:

"'A conveyance of a right-of-way to a railroad may be either in fee simple or may be an easement only.' /36 'The interpretation of such a deed to determine its effect is a mixed question of fact and law. It is a factual question to determine the intent of the parties. Then we must apply the rules of law to determine the legal consequences of that intent.' /37

This court in *Morsbach v. Thurston County* stated that a railroad right of way is more than an easement. /38 But that statement was clarified in *Swan v. O'Leary,* which stated that the intention of the parties to the conveyance is of paramount importance and must ultimately prevail in a given case. /39 In determining the intent of the parties, courts have considered whether the consideration was

substantial or nominal, whether the deed conveyed a strip or tract of land and limited its use to a specific purpose, whether the deed contained a habendum clause, and whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor. /40 When the granting clause of a deed conveys a right of way to a railroad, this court has usually concluded that the deed passes an easement and not a fee with a restricted use:

[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, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title." *Harris v. Ski Park Farms, Inc.*, 120 Wn.2d 727, 738, 844 P.2d 1006 (1993)

"This question ordinarily arises in situations such as the following: A owns a section of land. B wishes to construct a railroad over and across the land. A executes a deed to B for the railroad right of way. It may be the intention of the parties that B is to receive an easement only-a right to use the land for the purpose of operating a railroad thereon. On the other hand, it may be their intention that B is to receive a fee in the land conveyed-to become its owner. The intention of the grantor may be determined from the language contained in the granting clause of the deed, the circumstances surrounding its execution, and the subsequent conduct of the parties with relation thereto. See *Morsbach v. Thurston County*, 152 Wash. 562, 278 Pac. 686; *Swan v. O'Leary*, 37 Wn.2d 533, 225 P.2d 199; Annotation, 132 A. L. R. 142."
Scott v. Wallitner, 49 Wn.2d 161, 162, 299 P.2d 204 (1956)

"In attempting to arrive at the intention of the parties to similar conveyances, the courts have considered such factors as whether the consideration expressed was substantial or nominal; whether the deed conveyed a strip, piece, parcel or tract of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed; whether the deed conveyed a strip of land and limited its use to a specific purpose; whether the deed conveyed a right of way over a tract of land, rather than a strip, piece or parcel thereof; whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land; whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor; whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed. The courts have found no difficulty with those conveyances where a grantor, by appropriate words of conveyance, unqualifiedly conveyed a strip of land to a grantee by the usual form of conveyance; nor have they found any difficulty with those where a properly described right of way or easement over a designated tract of land was set forth in the instrument of conveyance. The difficulty arises when the instrument of conveyance is ambiguous, is in some way qualified, or appears to be a mixture of the two ideas." *Swan v. O'Leary*, 37 Wn.2d 533, 535-536, 225 P.2d 199 (1950)

"In determining whether the property owners have met their burden of showing that the original parties intended to adapt the statutory form to grant easements instead of fees simple, we have relied on the following factors:

(1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed;

(2) whether the deed conveyed a strip of land and limited its use to a specific purpose;

(3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof;

(4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land;

(5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor;

(6) whether the consideration expressed was substantial or nominal; and

(7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed. *Swan*, 37 Wn.2d at 535-36.

In addition to the language of the deed, we will also look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties. *Scott v. Wallitner*, 49 Wn.2d 161, 162, 299 P.2d 204 (1956); see also *Harris v. Ski Park Farms, Inc*., 120 Wn.2d 727, 739, 844 P.2d 1006 (1993), cert. denied, 114 S. Ct. 697, 126 L. Ed. 2d 664 (1994)."

Brown v. State, 130 Wn.2d 430, 438, 924 P.2d 908 (1996)

Using the factors and principles discussed above, I apply them to the Hilchkanum and Simpson deeds. *This will show that the deeds are not similar in any significant way, contrary to King County's claim.*

***A comparison of the Hilchkanum and Simpson deeds*:**

To determine the intention of the parties to the deeds, we consider the instrument as a whole by applying the factors listed in *Brown* at 438. But first, we look for the words "right of way" in the deeds and determine if those words are used to limit the interest granted, or merely to describe the strip of right of way land.

Are the words "right of way" used in these railroad deeds, and how are they used?

Hilchkanum: Yes. The granting clause 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
>
> Lots one (1) two (2) and three (3) in section six (6) township 24 North of Range six (6) East.
>
> 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. "[5] (Survey description of the railroad centerline follows.)

[5] John Rasmussen translation of the original handwritten Hilchkanum deed to digital format.

In Hilchkanum, the words "right of way" are used in *both ways.* They are used as language to *limit the grant* in the first paragraph: "… 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 the third paragraph, the words are merely used *to describe the property*: "… Such **right of way** strip to be fifty (50) feet in width…".

The use of the words "right of way" to limit and qualify the grant in the first paragraph of Hilchkanum are the strong evidence of an easement that the Washington State Supreme Court was looking for in the deeds it construed in *Brown*. The Court did not find those words in any of the 37 private deeds it examined in that case. The *Roeder* III court did not find those words to limit the right of way grant either, as shown above.

Simpson: Yes. The words "right of way" appear in the Simpson deed *only to describe the property, not to limit the grant*. This use of the words does not indicate an easement. This is explained in *Brown v. State*, 130 Wn.2d 430, 441-442, 924 P.2d 908 (1996), also quoted above.

"(1) whether the deed conveyed a strip of land, and did not contain additional language relating to the use or purpose to which the land was to be put, or in other ways limiting the estate conveyed;"

Hilchkanum: No. Hilchkanum granted strips of land, but the deed does include language that limits the grant to an easement.

Simpson: Yes. Simpson meets this test that would indicate that fee simple title was passed with the deed.

"(2) whether the deed conveyed a strip of land and limited its use to a specific purpose;"

Hilchkanum: Yes. Hilchkanum limited the grant to an easement by granting a right of way for railroad purposed in the granting clause.

Simpson: No. Simpson did not limit the grant. This would suggest that fee title was passed.

"(3) whether the deed conveyed a right of way over a tract of land, rather than a strip thereof;"

Hilchkanum: No. Hilchkanum conveyed a strip of land, which requires further examination as shown above.

Simpson: No. Simpson also granted a strip of land, so, requires further examination as shown above.

"(4) whether the deed granted only the privilege of constructing, operating, or maintaining a railroad over the land;"

Hilchkanum: Yes. The words "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…" show that the right of way grant was for railroad purposes only. This is consistent with a railroad easement.

Simpson: No. Simpson did not limit the grant to railroad use. This suggests a grant of fee simple title.

"(5) whether the deed contained a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor;"

Hilchkanum: No. A clause of this nature would support the idea of it being an easement. However, this language is not required in the Hilchkanum deed to qualify it to be an easement because the granting clause grants a right of way for railroad purposes, and there is no other language in the deed that would counter that strong evidence. The clause referred to here is normally found in the habendum. The habendum may be used to

define the extent of ownership, but with Hilchkanum, this has already been defined in the granting clause. This clause is not necessary to confirm Hilchkanum to be an easement, but would be further reinforcement if it were there.

Simpson: No. There is no language in the Simpson deed that would cause it to revert to the grantor. This would continue to support the idea that Simpson passed fee title.

"(6) whether the consideration expressed was substantial or nominal;"

Hilchkanum: No. Hilchkanum was paid no consideration for the grant of the easement. This suggests and supports the idea that this deed is an easement.

Simpson: Yes. Simpson was paid $700 for his land. This would support the idea that this was a transfer of fee title.

"(7) whether the conveyance did or did not contain a habendum clause, and many other considerations suggested by the language of the particular deed."

Hilchkanum: Yes. The habendum clause is "standard" with Hilchkanum. "To have and to hold the said premises with the appurtenance unto the said party of the second part and to its successors and assignors forever"[6] Since the granting clause already granted an easement, the habendum would serve

[6] John Rasmussen translation of the original handwritten Hilchkanum deed to digital format.

the function to *lessen, enlarge, explain or qualify* that grant. It takes none of these roles and leaves the grant of an easement unaltered and intact. In *Swan*, the deed was found to be an easement with a similar habendum as shown here: "To Have and to Hold, All and singular the said premises together with the appurtenances, unto said part*y* of the second part, and to *his* heirs and assigns forever" *Swan v. O'Leary*, 37 Wn.2d 533, 533-534, 225 P.2d 199 (1950)

Simpson: No. The Simpson does not have a habendum in the commonly understood sense. There are no parts of this deed that limit the grant to a railroad right of way.

"In addition to the language of the deed, we will also look at the circumstances surrounding the deed's execution and the subsequent conduct of the parties."

SLS&E: The subsequent conduct of SLS&E makes its intentions clear. The railroad was established along East Lake Sammamish during 1887-1889, and parts of it are still in service today. The Redmond-Issaquah portion ran trains for over one hundred years until Burlington Northern Santa Fe (BNSF) abandoned that spur in 1996. This "subsequent conduct" makes it clear that the SLS&E obtained the rights of way for railroad purposes.

Hilchkanum: There are several factors that support the idea of Hilchkanum deed being an easement.

1. The deed signed by the Hilchkanums was prepared by the educated white men that organized the railroad. The Hilchkanums, on the other hand, were Indians unable to even sign their own names on the deed. They both signed with an "X". In his homestead application Bill Hilchkanum certified that he had given up his tribal affiliation in order to qualify. This would

indicate the Hilchkanums were not educated nor likely socialized to all of the white man's customs. With this thought in mind, the Hilchkanums were at a great disadvantage in their transaction with SLS&E. Since the deed was drafted by SLS&E, and the Hilchkanums probably had little or no unbiased legal advice, the deeds must be construed most strongly against SLS&E. This would favor the deed's interpretation as an easement. This is supported in the citation from *Brown* below:

> "The railroad was a sophisticated, well financed, and organized party, undoubtedly represented by counsel. Landowners stood at a disadvantage to railroads in the early 1900s. For these reasons, the deeds, at least the preprinted portions of them, must be construed against the railroad. '[C]ontract language . . . is construed most strongly against the party who drafted it, or whose attorney prepared it.'" *Brown v. State*, 130 Wn.2d 430, 457, 924 P.2d 908 (1996)

2. Another circumstance would be that the SLS&E spur extension to the present city of Issaquah was for a speculative coal venture. The local founders of the railroad were forced to raise cash in the East to finance this project. This would make it more likely that they would obtain easements along East Lake Sammamish. Easements would be less expensive and still get the railroad built to the Gilman coalfields.

> "One Gilman testified that 'I was the original promoter [of the Seattle, Lake Shore & Eastern Railway]. My attention was first called to Seattle by a description being sent to me of this particular coal field, and I went there from New York for the express {*499} purpose of looking into this coal field.***I then organized the Seattle, Lake Shore & Eastern Railroad Company, and secured terminals at tide water at Seattle, had partial surveys of the route made, and came to New York

for the purpose of raising the money necessary to build this 40 miles connecting the coal field with tide water at Seattle'." *Manhattan Trust Co. V. Seattle Coal & Iron Co.* 19 Wash. 493, 498-499, 53 P. 951 (1898).

3. On page 11 of Mr. Scott Johnson's Brief in Support of King County's Motion for Summary Judgment, he attributes great significance to a deed of sale that Hilchkanum subsequently made of a ***nearby*** property. In that deed, Hilchkanum appears to exempt out the land under the railroad right of way in the fee simple transfer of title. Mr. Johnson believes this proves Hilchkanum's intention to convey fee simple title on the *property at issue. Mr. Johnson is using two different properties and deeds here.* Without conceding that Mr. Johnson is correct in his analysis of that nearby property transaction, how does Hilchkanum's intentions in another deed prove his intentions in this one? This is "a stretch". Further, the county tries to make this uneducated Native American a sophisticated real-estate lawyer in this argument. Since Bill and Mary Hilchkanum could not even sign their names, it is another stretch to imagine that the Hilchkanums could have any sophistication and expertise in real-estate law. It would seem more likely that they depended on the advice of others in drafting their deeds. This would explain why similar deeds to nearby properties by the same grantor (Hilchkanum) would vary. I find it hard to draw any conclusion from Mr. Johnson's facts that would support his conclusion.

4. If the court accepts Mr. Johnson's theory about the ability of the Hilchkanums to analyze and draft deeds, I then offer these thoughts. Even if the Hilchkanums were unsophisticated, it is likely that they understood the basic idea of selling something. The concept that one gets something of monetary value in return when selling something is basic to most societies.

When the Hilchkanums sold property a few years after they granted the right of way easements, they received a cash value in those transactions.[7] Even when Annie Hilchkanum sold a portion of her property to her husband, Bill, in 1899, she memorialized it with "one dollar (and love and affection)."[8] Contrast that with the right of way deed to SLS&E where *no monetary compensation was specified in the transaction*. If we are to analyze the Hilchkanum deed with these facts in mind, it further supports the idea that the railroad deed did not grant fee simple title, and was only an easement.

5. The county implies that the intent in the Hilchkanum, Simpson and the *Roeder* III deeds compare because they are all titled "Right of Way Deed" with the Simpson and the *Roeder* III deeds being found to convey fee simple title.[9] From the discussion above, the term right of way can be used in two different ways in a deed. It is necessary to look at the whole instrument and determine how the words "right of way" are used to determine their effect. Apparently, the county would have us believe, that since Simpson and *Roeder* III were titled "Right of Way Deed" and subsequently found to have conveyed fee simple title, that the Hilchkanum deed can then be assumed to have passed fee simple title also. From the discussion above one can clearly see the flaw of this logic. When a grant of right of way for railroad purposes is stated in the granting clause, the intent of the parties has been found to grant only an easement, irrespective of the title of the deed and in spite of the words "fee title" being used in that same

[7] See Declaration of Scott Johnson in Support of K.C. SJM, Exhibit 5.

[8] See Declaration of Scott Johnson in Support of K.C. SJM, Exhibit 5.

[9] See Scott Johnson's Brief in Support of King County's SJM, Page 9.

granting clause. The following deed, found to be an easement, will demonstrate this point and show, again, **the power of the words "right of way" to indicate the grant of an easement.**

"THIS INDENTURE WITNESSETH, That *Minnie L. Swan, unmarried*, part*y* of the first part, for and **in consideration of the sum of *Six Hundred & Twenty-five* Dollars in *lawful money** of the United States of America to *her* in hand paid by *M.H. Draham* the part*y* of the second part, the receipt whereof is hereby acknowledged, has remised, released and forever quit-claimed, and by these presents do **sell, convey, remise, release and forever quit-claim** unto said part*y* of the second part, and to *his* heirs and assigns, the following described premises, situate, lying and being in the County of Thurston, State of Washington, ***for the purpose of a Railroad right-of-way** to-wit:-a strip of land 50 feet in width extending through the E 1/2 of the NE 1/4 of Section 24, in Township 18, North of Range 3 West W. M. said strip to be located 25 feet on either side of the permanent survey line thereof through said land made by R. L. O'Brien in December 1908 and January 1909 now in the hands of the party of the second part; also a right-of-way of the same width which commences at a point 7 feet West of the Northeast corner of the SW 1/4 of the SE 1/4 of Section, Township & Range aforesaid, and extending in a Southwesterly direction with necessary curves to a point on the South line of said SW 1/4 of SE 1/4 not more than 590 feet from the South West corner of said SW 1/4 of SE 1/4*.

Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and

> profits thereof. To Have and to Hold, All and singular the said premises together with the appurtenances, unto said part*y* of the second part, and to *his* heirs and assigns forever "IN WITNESS WHEREOF, The said part*y* of the first part has hereunto set *her* hand and seal the *17th* day of *April* A. D. 190*9*" *Swan v. O'Leary*, 37 Wn.2d 533, 533-534, 225 P.2d 199 (1950)

This deed from *Swan* has language in the granting clause that strongly suggests a grant of fee title: "…do sell, convey, remise, release and forever quit-claim unto said part*y* of the second part…". Despite this language the deed was found to have granted only an *easement* because of the fact that a "Railroad right of way" was granted in the granting clause:

> "We think when the opinion is critically read and considered with the precise question we have before us in mind, it 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**, and not a fee with a restricted use, even though the deed is in the usual form to convey a fee title." *Swan v. O'Leary*, 37 Wn.2d 533, 537, 225 dP.2d 199 (1950)

The county exaggerates the importance of the title of the deed and ignores the well established rule that only considers the title's importance in relation to the words and meaning of the whole deed.

Comparing the Hilchkanum and Squire deeds:

If the Hilchkanum and Simpson deeds are not alike, is there a deed that closely resembles Hilchkanum? The *Squire* deed, granted by Watson and Ida Squire to SLS&E on March 29, 1887 is very similar to Hilchkanum. The following shows the essential elements of that deed.

***Squire deed*:**

"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 a right-of-way Fifty (50) feet in width through said lands in said County, described as follows, to-wit: [legal description].

Such right-of-way strip to be twenty-five (25) feet in width on each side of the center line of the railway track as located across the said lands by the Engineer of said Railway Company, which location is described as follows, to-wit [description.]

To Have and to Hold the said premises, with the appurtenances, unto the said party of the second part, and to its successors and assigns forever or so long as said land is used as a right-of-way by said railway Company, Expressly reserving to said grantors their heirs and assigns all their riparian rights and water front rights on the shores of Lake Washington. And this grant is upon the condition that said railway shall be completed over said lands on or before January 1st, 1888. . . King County v. Squire Investment Co., 59 Wn. App. 888, 890, 801 P.2d 1022 (1990)

For comparison, I copy the same elements from the Hilchkanum deed here.

Hilchkanum deed:

" 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 [legal description.]

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. [description.]

And the said Seattle Lake Shore and Eastern Railway Company shall have the right to go upon the land adjacent to said line for a distance of two hundred (200) feet on each side thereof and cut down all trees dangerous to the operation of said road.

To have and to hold the said premises with the appurtenance unto the said party of the second part and to its successors and assignors forever"[10]

One might ask why would King County try to compare Hilchkanum to Simpson when Hilchkanum and Squire are almost identical? The answer to that question is in the following quote from *Squire*:

"**King County acknowledges that the original deed conveyed a fee simple determinable or a *right of way easement*.** It contends, however, that the limitation within the deed, which conveyed the property "so long as said land is used as a right-of-way by said railway Company," was never violated, despite Burlington Northern's formal abandonment, because the railroad once carried passengers traveling for

[10] John Rasmussen translation of the original handwritten Hilchkanum deed to digital format.

recreation, just as a trail would. It further argues that the trial court's holding promotes forfeitures and any reverter rights were personal to Watson and Ida Squire. We disagree." *King County v. Squire Investment Co.,* 59 Wn. App. 888, 892, 801 P.2d 1022 (1990))

King County ignores Squire because it destroys its claim to ownership of my property. Here are the similarities between Hilchkanum and Squire:

Both deeds granted a right of way to SLS&E for railroad purposes using the *same wording*. This very strongly suggests an easement.

Both deeds granted strips of land and limit its use to a specific purpose, using the *same words.*

Both deeds granted only the privilege of constructing, operating, or maintaining a railroad over the land, using *exactly the same words*.

Both deeds were granted with nominal consideration. Neither Hilchkanum nor *Squire* was paid any monetary compensation for their easements. They both granted a right of way for the "benefits and advantages to accrue", rather than a cash amount. Again, *exactly the same words* were used.

Both deeds were established with the same circumstances surrounding the deed's execution and the subsequent conduct of the parties because they were *established just five weeks apart, on the same railroad line.*

One *minor difference* between the deeds is that Squire had a clause providing that if the railroad ceased to operate, the land conveyed would revert to the grantor. Hilchkanum did not have such a clause. In *Squire* that statement is in the habendum. Since the granting clause of the deed already specified a right of way for railroad purposes, the habendum in this case only serves the purpose of explaining or qualifying that grant. That clause

simply reinforces the reversionary language already in the granting clause, and is not necessary to prove the deed an easement. This fact is supported in *Squire* at 894:

> "The *Squire* deed granted a 'right-of-way Fifty (50) feet in width through said lands'. This suggests an easement was conveyed. Both King County and *Squire* note, however, that the habendum clause contains the handwritten language, 'or so long as said land is used as a right-of-way by said railway Company,' which arguably suggests conveyance of a fee simple determinable. If the granting clause merely conveyed the land to the railroad without reference to a right of way, the 'so long as' language would create such a fee. 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, particularly since the habendum clause granted the interest to the railroad and 'to its successors and assigns forever'. The authorities and cases discussed above *clearly support construing the Squire deed as an easement.*
>
> In *Veach v. Culp,* /5 the court construed a deed which **granted a right of way and used the standard habendum clause 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 the conveyance of a right of way indicated **an easement had been conveyed.**" *King County v. Squire Investment Co.,* 59 Wn. App. 888, 894, 801 P.2d 1022 (1990).

King County's claim to fee simple ownership of my land under the former BNSF right of way is without merit. The deeds from *Brown* and *Roeder* III that King County uses to compare to Hilchkanum have very little correlation to Hilchkanum. *King County v. Squire Investment Co.*, 59 Wn. App. 888, 801 P.2d 1022 (1990) should be controlling because of the close similarities between the construed deeds, and the fact the principles of construing the deeds are unchanged over the years.