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NO. 364305

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

HANS HENNINGS and KRISTINA HENNINGS, husband and wife, and
MARENGO, LLC, a Washington Limited Liability Company,

Appellants,

v.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a
corporation of the State of Wisconsin; THE STATE OF WASHINGTON;
and ALL OTHER PERSONS OR PARTIES UNKNOWN claiming any
right, title, estate, lien, or interest in the real estate described in the
complaint herein,

Respondents.

BRIEF OF RESPONDENT STATE OF WASHINGTON

ROBERT W. FERGUSON
Attorney General

Andy Woo
Assistant Attorney General
WSBA No. 46741
1125 Washington Street SE
P.O. Box 40100
Olympia, WA 98504-0100
OID No. 91033

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I. INTRODUCTION

The trial court correctly entered summary judgment in the State's favor dismissing Hans Hennings, Kristina Hennings, and Marengo, LLC's (collectively the Hennings) quiet title action as a matter of law because the Hennings have no remaining interest in the property at issue. In a 1907 deed, the Hennings' predecessor in interest, the Walla Walla Live Stock Company, conveyed a fee simple determinable interest to a railroad company, providing that the property would revert back to the grantor if the railroad company did not operate a railroad for any one year after construction. However, a 1918 deed explicitly released the railroad company from "any and all further compliance whatsoever with" this obligation to operate a railroad continuously. Thus, the subsequent cessation of railroad operations did not forfeit the railroad company's interest in the property. Instead, with the release of that condition, the Hennings' reversionary interest associated with this condition was extinguished.

Because the reversionary interest no longer exists by express operation of the 1918 deed, the court below correctly granted summary judgment in the State's favor on the basis that the Hennings do not possess a reversionary interest and no reversion has occurred. Further, the Hennings' reliance on cases regarding abandonment of railroad easements

are inapplicable because the State acquired a fee simple interest in the property in 1981—not an easement—and, therefore, could properly develop and manage the land as a public recreational trail. For the foregoing reasons, the State requests that this Court affirm the Order Granting Defendant State of Washington’s Motion for Summary Judgment.

II. STATEMENT OF THE ISSUE

Whether the court below correctly granted summary judgment to dismiss the Hennings’ quiet title action as a matter of law, where the Hennings’ predecessor in interest, by deed, unequivocally and unambiguously relinquished the reversionary interest on which the Hennings rely as the basis for their claim.

III. STATEMENT OF THE CASE

The State of Washington, through the Washington State Parks and Recreation Commission, administers the Palouse to Cascades Trail¹ (Trail) on a former railroad corridor that crosses through Adams County. The Chicago, Milwaukee, and St. Paul Railway Company (Railroad Company) acquired property for and constructed the railway line between 1906 and 1910. *Brown v. State*, 130 Wn.2d 430, 433, 924 P.2d 908 (1996). In 1981,

¹ More information about the Trail is available at <http://parks.state.wa.us/521/Palouse-to-Cascades> (last visited April 9, 2019).

the State acquired the former railroad corridor from the Railroad Company after the Railroad Company had ceased railroad operations on the corridor and declared bankruptcy. *Id.*; CP at 158. After acquiring the corridor, the State maintained it as a public trail for recreational use. CP at 158-60.

This case involves a section of the Trail corridor that abuts five parcels in Adams County owned by the Hennings. CP at 4, 7, 68-69, 78-79. The Hennings are the successors-in-interest to the original private landowner, the Walla Walla Live Stock Company, that conveyed the corridor to the Railroad Company's predecessors in a deed executed January 18, 1907 (the 1907 Deed), attached herein as Appendix I.² CP at 29-31.

² In the set of Clerk's Papers received by the State, the second page of the 1907 Deed, CP at 30, was poorly reproduced and largely illegible. An original scan image of the 1907 Deed, received by the State from the Hennings' counsel via email dated October 8, 2017, was enhanced by undersigned counsel using the "Enhance Scan" software feature in Adobe Acrobat DC. App. I. at 2. The software enhancement was applied only to the second page of the 1907 Deed; no alteration was made to the text or substance of any portion of the Deed.

The undersigned counsel emailed a true and complete copy of Appendix I to the Hennings' counsel on April 17, 2019. As of the date and time of filing, Hennings' counsel has neither agreed nor objected to the enhanced scan of the page in question. The Court should permit the attachment of the enhanced scan, since it is merely a legible copy of the same document designated in the record on review. RAP 10.3(a)(8); *see also Dickson v. Kates*, 132 Wn. App. 724, 727 fn.3, 133 P.3d 498 (2006) (relying on the legible copy of the deed in the appendix of appellant's brief in lieu of the illegible copy in the clerk's papers).

The 1907 Deed contained a number of “conditions and agreements,”

including the following:

This conveyance and all rights thereunder are made upon the express condition and agreement that the said Chicago, Milwaukee and St. Paul Railway Company of Washington, its successors or assigns, shall complete the construction and put in operation the line of standard gauge railroad upon the strip of land hereby conveyed, within four years from the date hereof, and that a failure on their part so to do will forfeit all rights hereunder and the said land and privileges hereby granted will immediately be forfeited and revert to the [Walla Walla Live Stock Company], its successors in interest or assigns, and that a failure to use and operate said line of railroad for any one year after its first construction and operation thereof will also forfeit all the interest of the [Railroad Company], in and to said strip of land and under this conveyance and the strip of land and all right and interest in and to anything conveyed hereby will forthwith be forfeited to and revert to the [Walla Walla Live Stock Company] its successors and assigns.

App. I at 2; CP at 30 (emphasis added); *see also* CP at 128.³

At some point between the execution of this deed in 1907 and 1918, the land at issue was conveyed from the Walla Walla Live Stock Company

³ For purposes of this case, the copies of the 1907 Deed and 1918 Deed recorded in the Adams County Auditor’s Office, CP at 30-31 (1907 Deed) and 33-34 (1918 Deed) are authoritative. These should be distinguished from copies of the respective abstracts of these two deeds also contained in the Clerk’s Papers. CP at 124-25 (1918 Deed abstract), 128-29 (1907 Deed abstract). These copies of the abstracts were provided as part of the Hennings’ briefing in the action below, but appear to be incomplete. *See id.* In any event, the available portions of the abstracts are not inconsistent with the substance of the deeds. *Compare* CP at 30-31, 33-34 *with* CP at 124-25, 128-29.

to Joseph Davin and Marie Davin. CP at 34. In 1918, the Davins conveyed by deed certain remainder interests in the 100-foot strip of land to the Chicago, Milwaukee and St. Paul Railway Company, which was the successor to the Chicago, Milwaukee, and St. Paul Company of Washington. CP at 33-34. This transaction between the Davins and the Railroad Company was reflected in a deed executed January 30, 1918 (the 1918 Deed), attached herein as Appendix II.⁴ App. II. to Resp't Br.; CP at 33-34.

The relevant portions of the 1918 Deed provide:

WHEREAS, it was in and by [the 1907 Deed], among other things, provided as follows:

“This conveyance and all rights thereunder are made upon the express condition and agreement that the said Chicago, Milwaukee and St. Paul Railway Company of Washington, its successors or assigns, shall complete the construction and put in operation the line of standard gauge railroad upon the strip of land hereby conveyed, within four years from the date hereof, and that a failure on their part so to do will forfeit all rights hereunder and the said land and privileges hereby granted will immediately be forfeited and revert to the party of the first part [Walla Walla Live Stock Company], its successors in interest or assigns, and that a failure to use and operate said line of railroad for any one year after its first construction and operation thereof will also forfeit all the interest of the [Railroad Company], in and to said strip of land and under this conveyance and the strip of land and all right and interest in and to anything conveyed hereby will forthwith be forfeited to and revert to the [Walla Walla Live Stock Company], its successors and assigns.”

⁴ This is directly excerpted from the Clerk's Papers, CP at 33-34, and simply attached herein as Appendix II for the Court's convenience.

It is expressly understood and agreed by and between the parties hereto that the party of the second part [Railroad Company], its successors and assigns shall construct a sidetrack upon said strip of land at some point in section 15 or 21, and that the [Railroad Company] shall select the same and that the party of the first part, its successors or assigns, shall have the right to construct and perpetually maintain a warehouse adjacent to said sidetrack so the grain and produce may be loaded on said sidetrack from said warehouse, which said warehouse may be constructed any length not exceeding 150 feet, and shall be for the uses of the [Walla Walla Live Stock Company] and its successors and assigns in interest in the ownership of the land now owned by the party of the first part adjacent to and over which said strip of land is hereby conveyed by this conveyance and for the uses of the owner of the East Half of Section 25, Township 18 North of Range 36 E.W.M., and if the [Railroad Company], its successors in interest or assigns shall fail to construct said sidetrack within ninety days after the complete construction and commencing the operation of said line of railroad, the [Railroad Company], its successors and assigns shall pay to the [Walla Walla Live Stock Company], its successors or assigns, the further sum of \$1000.00, and in the event of a failure to pay said sum should the same come due under the terms of this contract, then the [Railroad Company], its successors and assigns, will forfeit all its rights under and by virtue hereof and all interest in said land hereby conveyed, and the same will forthwith revert to and become the property of the [Walla Walla Live Stock Company], its successors and assigns.”

AND WHEREAS, said railway was constructed upon said strip of land within four (4) years from the date of said deed and has since been, and is, used and operated; and

WHEREAS, the said grantors herein [the Davins] have heretofore succeeded to all of the rights and interests of the said Walla Walla Live Stock Company in and to the lands described in said deed; and

WHEREAS, the Chicago, Milwaukee & St. Paul Railway Company, the grantee, has succeeded to all of the rights and interests of the said Chicago, Milwaukee & St. Paul Railway Company of Washington in and to said

strip of land conveyed to it and in and to the railway constructed by the said Chicago, Milwaukee & St. Paul Railway Company of Washington;

NOW THEREFORE the parties of the first part [the Davins], for and in consideration of the sum of One Dollar (\$1.00) to them in hand paid, the receipt whereof is hereby acknowledged, and other good and valuable considerations to them moving from the [Railroad Company], hereby release the [Railroad Company], its successors and assigns from any and all further compliance whatsoever with the terms and provisions of those certain covenants contained in [the 1907 Deed], above quoted and particularly from the obligation to construct or maintain a sidetrack or other station facilities, or to permit [the Davins] to construct and maintain a warehouse adjacent to such sidetrack, and from any and all claim whatsoever by reason of any failure on the part of [Railroad Company], its successors or assigns, to construct or maintain such sidetrack.

App. II at 1-2; CP at 33-34. As indicated above, the parties—in the paragraphs of the 1918 Deed marked out by quotation marks—specifically quoted verbatim two paragraphs from the 1907 Deed. *Id.* These two paragraphs correspond to the sixth and eighth paragraphs of the 1907 Deed, with the sixth paragraph being the one-year nonuse clause. *Compare* App. I (1907 Deed), *with* App. II (1918 Deed). These are the only two paragraphs within the Deed that contain forfeiture and reverter clauses. The parties omitted the seventh paragraph of the 1907 Deed—which addresses construction and maintenance obligations for grade crossings and cattle guards, but does not impose a reverter clause based on those conditions—from the quotation in the 1918 Deed. *Compare* App. I at 2 (1907 Deed),

with App. II at 1 (1918 Deed). The 1918 Deed then recites that the railroad was constructed on the 100-foot strip within four years, as required by the 1907 Deed. App. II at 2; CP at 34. Toward the end of the 1918 Deed, in the only paragraph beginning with “NOW THEREFORE,” it goes on to release the Railroad Company from further compliance with the “above quoted” terms and conditions that would have triggered forfeiture by the Railroad Company and reverter to the Davins—including the one relating to the failure to continually operate the railroad. *Id.*

In April 2017, the Hennings filed the underlying lawsuit against the Railroad Company and the State in Adams County Superior Court seeking to quiet title in those portions of the Trail corridor that abut the Hennings’ lands. The Hennings argue that those portions of the Trail corridor reverted to the Hennings’ predecessors in interest after railroad operations ceased on the corridor. CP at 2-3. The State moved for summary judgment and the trial court held a summary judgment hearing on October 22, 2018.⁵ CP at 391. The court found that the “reversionary interest is no longer extant.

⁵ The State filed its motion for summary judgment on September 21, 2018. The Hennings filed their motion for summary judgment a week after the State, on September 28, 2018. As a result, the parties’ respective motions for summary judgment were not heard at the same hearing; the State’s motion was heard, and granted, on October 22, 2018, while the hearing for the Hennings’ motion was set for October 29, 2018. Because the court granted summary judgment in the State’s favor, the hearing for the Hennings’ motion was stricken.

[The Hennings] do not possess such reversionary interest, and no reversion has occurred,” and thus granted summary judgment in the State’s favor. CP at 390. An Order Granting Summary Judgment for the State of Washington was entered on October 22, 2018. CP at 390-91. The Hennings appealed.

IV. ARGUMENT

The trial court correctly entered summary judgment in the State’s favor to dismiss Appellants’ claim as a matter of law because the reversionary interest on which the Hennings’ claim relies was expressly relinquished by the 1918 Deed, and the Hennings’ arguments regarding abandonment of easements do not apply because the State owns the Trail corridor in fee simple.

A. Standard of Review

In reviewing an appeal from summary judgment, this Court engages in the same inquiry as the trial court. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Rainier Nat’l Bank v. Sec. State Bank*, 59 Wn. App. 161, 164, 796 P.2d 443 (1990). Here, summary judgment was appropriate because the parties do not contest the material facts, which make clear that the 1918 Deed relinquished the Hennings’ reversionary interest in the property at issue.

B. The State Is Entitled to Judgment as a Matter of Law Because the Hennings Do Not Have a Reversionary Interest

The trial court correctly granted summary judgment in the State's favor because the Hennings do not possess a reversionary interest. As the Hennings recognize, a successor in interest in land cannot have an interest that its predecessor in interest cannot convey. Appellants' Br. at 9. The reversionary interest on which the Hennings base their claim was relinquished by their predecessors in interest in 1918 by deed. Consequently, no such reversionary interest existed after the 1918 conveyance and no reversion occurred.

In construing a deed, courts "determine the intent of the parties from the language of the deed as a whole." *Newport Yacht Basin Ass'n of Condo. Owners v. Supreme Nw., Inc.*, 168 Wn. App. 56, 64, 277 P.3d 18 (2012). In doing so, "a court must give meaning to every word if reasonably possible." *Hodgins v. State*, 9 Wn. App. 486, 492, 513 P.2d 304 (1973) (citing *Fowler v. Tarbet*, 45 Wn.2d 332, 334, 274 P.2d 341 (1954)); *Newport Yacht Basin*, 168 Wn. App. at 64. Due to the "practical consequence of the permanent nature of real property," courts recognize that "the language of the written instrument is the best evidence of the intent of the original parties to a deed." *Newport Yacht Basin*, 168 Wn. App. at 65. In general, where the court remains in doubt as to the parties' intent, "a deed will be construed against

the grantor.” *Id.* (citing *Ray v. King Cty.*, 120 Wn. App. 564, 587 n.67, 86 P.3d 183 (2004) (quoting 17 William B. Stoebuck & John W. Weaver, *Washington Practice: Real Estate: Property Law* § 7.9. at 463 (1995)). Additionally, “[t]he general rule in Washington is that conditions on conveyances that may result in forfeiture are highly disfavored. Therefore, language of limitation that could lead to forfeiture is strictly construed.” *Alby v. Banc One Fin.*, 119 Wn. App. 513, 523, 82 P.3d 675 (2003).

1. The 1907 Deed Conveyed a Fee Simple Determinable to the Railroad Company With a Possibility of Reverter in the Hennings’ Predecessor(s) in Interest

The 1907 Deed, described above, conveyed by statutory warranty deed a fee simple interest to the Railroad Company, but created certain reversionary interests in the Walla Walla Live Stock Company (or its successors or assigns), such that if the Railroad Company did not meet certain conditions, the Railroad Company’s interest in the property would be forfeited and the property would revert back to the Walla Walla Live Stock Company (or its successors or assigns). *See* App. I at 1-2; CP at 29-30. This conveyance “constitutes what is technically known as a determinable, defeasible, or qualified fee.” *King Cty. v. Hanson Inv. Co.*, 34 Wn.2d 112, 116-117, 208 P.2d 113 (1949); *see also Wash. State Grange v. Brandt*, 136 Wn. App. 138, 150, 148 P.3d 1069 (2006) (“A fee simple

determinable . . . is an estate that automatically terminates on the happening of a stated event and reverts back to the grantor by operation of law.”).

“[A] determinable or qualified fee has all the attributes of a fee simple, except that it is subject to be defeated by the happening of the condition which is to terminate the estate, the grantor retaining at most a mere possibility of reverter.” *King Cty.*, 34 Wn.2d at 118. Specifically at issue here is the condition requiring the railroad to be operated continually after construction. Under the 1907 Deed, if the Railroad Company failed “to use and operate said railroad for any one year after its construction and operation thereof,” the Company would “forfeit all interest” in the land, and all rights and interests conveyed by the 1907 Deed would revert to the grantor (Walla Walla Live Stock Company). App. I at 2; CP at 30. By this language, the 1907 Deed plainly conveyed a “fee simple determinable” to the Railroad Company, leaving the Walla Live Stock Company and its successors in interest a “possibility of reverter.” *Washington Real Property Deskbook Series: Vol. 3, Interests and Real Property and Duties of Third Parties* § 1.2(2)(a) (Wash. St. Bar Assoc. 4th ed. 2009); 17 Stoebuck & Weaver, §§ 1.7, 1.8, 1.16.

2. The 1918 Deed Unequivocally and Unambiguously Relinquished the Reversionary Interest Once Held by the Hennings' Predecessors in Interest

The 1918 Deed, however, expressly quoted and extinguished the one-year nonuse condition, along with its possibility of reverter. App. II; CP at 33-34. A possibility of reverter can be relinquished to the grantor or the grantor's successors in interest. 17 *Stoebuck & Weaver*, § 1.16 ("Of course, a possibility of reverter may be released by its owner, the proper instrument being a deed of release to the owner of the preceding determinable estate."); *Alby*, 119 Wn. App. at 520. Where the condition of defeasibility (e.g., the one-year nonuse condition) is relinquished or otherwise removed, "the resulting interest is fee simple absolute." *Kennewick Pub. Hosp. Dist. v. Hawe*, 151 Wn. App. 660, 666, 214 P.3d 163 (2009); accord *Disney v. Wilson*, 190 Va. 445, 457, 57 S.E.2d 144 (1950) ("It is an established principle that where the condition upon which an estate can be divested can no longer arise, the estate, being freed of the condition, is rendered absolute.").

In the 1918 Deed, the Davins, who owned the determinable estate (the possibility of reverter) as successors in interest to the Walla Walla Live Stock Company, conveyed to the Railroad Company a release of the Railroad Company's obligation to meet certain conditions in the 1907 Deed, including the condition that the Railroad Company continuously operate the

railroad. CP at 33-34. The 1918 Deed provides that the Davins “hereby releases and assigns from any and all further compliance whatsoever with the terms and provisions of those certain covenants contained in [the 1907 Deed], above quoted” App. II at 2; CP at 34 (emphasis added). One of the “terms and provisions” of the 1907 Deed that was “above quoted” is the condition of continuous operation of the railroad. App. II. at 1; CP at 33. As a result, the Railroad Company’s interest in the subject property is rendered absolute. *See Kennewick Pub. Hosp. Dist.*, 151 Wn. App. at 666.

The Hennings’ argument that the 1918 Deed fails to provide any “specific language relinquishing [the reversionary] interest” (Appellants’ Br. at 7) is incorrect: the Deed specifically quotes the “terms and provisions” being released from the 1907 Deed, including the one-year nonuse clause. “An interpretation of a contract that gives effect to all provisions is favored over an interpretation that renders a provision ineffective, and a court should not disregard language that the parties have used.” *Snohomish Cty. Pub. Transp. Benefit Area Corp. v. FirstGroup America, Inc.*, 173 Wn.2d 829, 840, 271 P.3d 850 (2012). Therefore, the Court must reject the Hennings’ invitation to read the term “and particularly” as prescribing the only relevant language and rendering all preceding language meaningless. Doing so contradicts the well-established principle that “[i]n the construction of a deed, a court must give meaning to

every word if reasonably possible.” *Hodgins*, 9 Wn. App. at 492 (citing *Fowler*, 45 Wn.2d at 334). The parties plainly intended to release the Railroad Company both “from any and all further compliance . . . with the terms and provisions of those certain covenants in [the 1907 Deed], above quoted and particularly from the obligation to construct or maintain a sidetrack or other station facilities” App. II at 2; CP at 34 (emphasis added).

This plain interpretation of the parties’ intention is further supported by the fact that the 1918 Deed quotes the sixth paragraph (continual operation obligation with one-year nonuse reverter clause) and eighth paragraph (sidetrack and warehouse construction obligations with reverter clause) of the 1907 Deed, but omits the seventh paragraph (grade crossing and cattle guard construction and maintenance obligations with no reverter clause). *Compare* App. I (1907 Deed), *with* App. II (1918 Deed). Had the parties intended to release only the sidetrack and warehouse construction obligations encapsulated in the 1907 Deed’s eighth paragraph, they could have simply omitted the sixth paragraph, as they did with the seventh paragraph, from the quotation in the 1918 Deed. Instead, the parties chose to include in the quotation both of the paragraphs that impose forfeiture and reverter conditions, and omit paragraphs that do not, *id.*, evidencing a plain intention to release all of the defeasible conditions stated in the 1907 Deed.

Rules of construction further dispel any ambiguity and make clear that the 1918 Deed extinguished the one-year nonuse reversionary clause. Courts construe provisions in a deed against the grantor—i.e., the Hennings’ predecessors in interest.⁶ *Newport Yacht Basin*, 168 Wn. App. at 65; *Ray*, 120 Wn. App. at 586-87 & 587 n.67. In addition, any ambiguity must be resolved in favor of the State because forfeiture of property interests through reversionary clauses is highly disfavored in Washington, and any language that could lead to forfeiture of property interests is strictly construed. *Alby*, 119 Wn. App. at 523. Thus, because the Davins expressly quoted and relinquished the possibility of reverter based on nonuse of the railroad in 1918, the reversionary interest no longer existed and therefore the Davins could not have conveyed such an interest to any successors in interest, including the Hennings.

⁶ The general rule of construing against the grantor applies even in the context of railroad deeds. *Ray*, 120 Wn. App. at 586-87. In *Ray*, despite “the undisputed evidence that the Hilchkanums [grantors] could neither read nor write,” Division I declined to construe a deed against the railroad company and noted that the court “would construe the deed against the Hilchkanums, the grantors,” unless there is evidence in the record to indicate “that the Hilchkanums failed to understand what they were doing in this particular transaction” or prove that the notary who drafted the deed was an agent of the railroad company.

3. The 1918 Deed Does Contain a “Whereas” Clause Specific to the Reversionary Interest

The Hennings additionally suggest the superior court erred because the 1918 Deed did not have a “Whereas” clause specific to the reversionary interest. Appellants’ Br. at 3. This suggestion lacks merit and is plainly contradicted by the 1918 Deed, which refers to the reversionary interest under its second “Whereas” clause, which quotes two paragraphs from the 1907 Deed, including:

WHEREAS, it was in and by said deed, among other things, provided as follows . . . that a failure to use and operate said line of railroad for any one year after its first construction and operation thereof will also forfeit all the interest of the [Railroad Company].

CP at 33. It follows, then, that the culminating “NOW THEREFORE” clause, which contains the operative release, had all the preceding “Whereas” clauses in mind—including this one. *See Newport Yacht Basin*, 168 Wn. App. at 64 (holding that courts “determine the intent of the parties from the language of the deed as a whole”). In any event, apart from a cursory statement in their “Assignments of Error,” Appellants’ Br. at 3, the Hennings cite no authority in support of their suggestion and do not further articulate it in the body of their brief. *See Smith v. King*, 106 Wn.2d 443, 452, 722 P.2d 796 (1986) (holding that without argument or authority to support it, an assignment of error is waived).

4. The Hennings' Arguments Relating to Abandonment of Railroad Easements Do Not Apply

The Hennings, while recognizing the issue on appeal is whether the reversionary interest was relinquished, Appellants' Br. at 3, nevertheless cite cases addressing abandonment of easements, *id.* at 6-7, and refers to the 1918 Deed as an "easement" at least once in their brief, *id.* at 10. To the extent the Hennings are suggesting that the Court construe the 1907 and 1918 Deeds as easements, or seeking to argue by analogy, the State responds as follows.

Not only have the Hennings fallen far short of meeting their burden of proving that the deeds in fact conveyed an easement, *see Brown*, 130 Wn.2d at 437-38, the Washington Supreme Court held that use of the statutory warranty deed—like the 1907 Deed in this case—conveys a fee simple, not an easement. In 1996, the Washington Supreme Court explained that "where the original parties utilized the statutory warranty form deed and the granting clauses convey definite strips of land, [the courts] must find that the grantors intended to convey fee simple title unless additional language in the deeds clearly and expressly limits or qualifies the interest conveyed." *Brown*, 130 Wn.2d at 437. This is consistent with the "settled rule in this state, as elsewhere, that a deed which by its terms *conveys* the land to a grantee operates as a grant of the fee, although it may also contain

a recital designating, or even restricting, the use to which the land may be put.” *King Cty.*, 34 Wn.2d at 119 (emphasis in original). Further, courts give “special significance to the words ‘right of way’ in railroad deeds,” viewing the inclusion of that phrase as indicating an easement was intended, and the absence of that phrase as indicating a fee simple interest was conveyed. *Brown*, 130 Wn.2d at 438.

Here, the original parties to the 1907 Deed conveyed a fee simple determinable in the strip of land, subject to a possibility of reverter as discussed above. As in *Brown*, the parties utilized a statutory warranty form deed stating that the grantor “conveys and warrants” the property, the Railroad Company received a definite strip of land, and the words “right of way” are not included in the Deed. App. I; CP at 29-31. Furthermore, under the Deed, non-performance of a condition would result in reversion, reflecting further that a fee simple determinable was conveyed rather than an easement. Compare App. I at 2 (“said land . . . will immediately . . . revert to [grantor]”), with *Wash. State Grange*, 136 Wn. App. at 150 (“the language ‘reverts back’ followed by the phrase ‘in event it is no longer used for [the specified] purposes’ created a determinable fee simple with a possibility of reverter in the [grantor]”). Indeed, the “revert to” language would not have been necessary had an easement been conveyed, because an easement would have necessarily expired by abandonment when the

specified purpose of the easement (e.g., railroad operations) ceased. *Lawson v. State*, 107 Wn.2d 444, 451, 730 P.2d 1308 (1986).

Thus, the 1907 Deed conveyed a fee simple determinable to the Railroad Company with a possibility of reverter in the Hennings' predecessor(s) in interest. Any suggestion that the Deed instead conveyed an easement is unsupported by the plain language of the Deed or any controlling authority. To the extent the Hennings seek to rely on railroad easement cases to argue by analogy, the Court of Appeals has expressly declined to do so. *Ray*, 120 Wn. App. at 593 ("But these cases are entirely inapposite. Each of these cases considered the scope of the use of a right of way easement, not the location of property transferred in fee simple by deed."). Consequently, the cases cited by the Hennings relating to the abandonment of easements for the specified purpose are inapplicable.

V. CONCLUSION

The plain language of the relevant deeds makes clear that the 1907 Deed conveyed a fee simple determinable to the Railroad Company with a possibility of reverter in the Walla Walla Live Stock Company after one year of nonuse, but that this condition, along with its possibility of reverter, was expressly quoted and released by the Davins as successors in interest to the Walla Walla Live Stock Company in the 1918 Deed. Upon relinquishment of the possibility of reverter, the Railroad Company's

interest in the property became fee simple absolute, and the same was subsequently conveyed to the State.

Because the possibility of reverter was no longer extant by the time the Railroad Company ceased railroad operations on the Trail Corridor, the Trail Corridor never reverted to the Hennings' predecessors in interest and therefore was never conveyed to the Hennings. The court below correctly granted summary judgment in the State's favor on those bases. For the foregoing reasons, the State requests that this Court affirm the Order Granting Defendant State of Washington's Motion for Summary Judgment entered on October 22, 2018, and award costs to the State, as the prevailing party under Title 14 of the Rules of Appellate Procedure, for statutory attorney's fees, as set in RCW 4.84.080, and reasonable expenses incurred by the State in this appeal.

RESPECTFULLY SUBMITTED this 22nd day of April, 2019.

ROBERT W. FERGUSON
Attorney General

s/ Andy Woo

ANDY WOO, WSBA #46741
Assistant Attorney General
1125 Washington Street SE
Post Office Box 40100
Olympia, Washington 98504-0100
(360) 586-4034
OID No. 91033
*Attorneys for Respondent State of
Washington*

PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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Toni Meacham
Attorney at Law
1420 Scootenev Road
Connell, Washington 99326-5000

*Attorney for Appellants Hans Hennings and Kristina
Hennings and Marengo, LLC*

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 22nd day of April 2019 at Olympia, Washington.

s/Jeanne Roth
Jeanne Roth, Legal Assistant

Appendix I

6DEED

KNOW ALL MEN BY THESE PRESENTS, That Walla Walla Live Stock Company, a corporation, organized under the laws of the State of Washington, with its principal place of business at Walla Walla, Washington, party of the first part, for and in consideration of the sum of One Thousand Dollars, to it in hand paid, the receipt of which is hereby acknowledged and for other valuable considerations does hereby convey and warrant unto the Chicago, Milwaukee and St. Paul Railway Company, of Washington, party of the second part, its successors and assigns, a strip of land 100 feet in width, extending over and across from the East side to the South side of Section 15 in Township 18 North of range 37 E.W.M, and from the East side to the West side of section 21, township 18 North of range 37 E.W.M., and from the North side to the West side of section 29 in township 18 North of range 37 E.W.M., and from the north side to the West side of section 31 township 18 North of range 37 E.W.M. and from the east side to the North side of the West half of section 25 township 18 North of range 36 E.W.M. all in Adams County State of Washington.

Hereby conveying a strip, belt or piece of land fifty feet in width on each side of the center line of railroad of said Company as now located and established over and across said land; being about sixty two (62) acres in extent.

And said grantor for the consideration aforesaid, for themselves and for its heirs, assigns and legal representatives, further grant to said Company, its successors and assigns, the right to protect any cuts which may be made on said land, by erecting on both sides thereof, and within one hundred and fifty feet from said center line, portable snow fences Provided however, that such fences shall not be erected before the 15th day of October, of each year, and shall be removed on or before the first day of April of the year next ensuing their erection.

Hereby granting and conveying to said company its successors and assigns, a fee simple title to said strip of land, together with all rights, privileges and immunities that might be acquired by the exercise of the right of eminent domain.

And said grantor for itself and for its heirs, assigns, or legal representatives, covenant and agree that said grants are upon no other consideration than that named herein, that neither said Railway Company nor its agents have made any agreement, promise, or condition verbal or written, for or relating to any crossing, passageway, or other privilege

over across or under said railway except as herein stated, and that the right thereto, shall be only conferred by statute, or by an instrument in writing under the Corporate seal of said railway Company, or by the terms stated in this instrument.

THIS conveyance and all rights thereunder are made upon the express condition and agreement that the said Chicago, Milwaukee and St. Paul Railway Company of Washington, its successors or assigns, shall complete the construction and put in operation the line of standard gauge railroad upon the strip of land hereby conveyed, within four years from the date hereof, and that a failure on their part so to do will forfeit all rights hereunder and the said land and privileges hereby granted will immediately be forfeited and revert to the party of the first part, its successors in interest or assigns, and that a failure to use and operate said line of railroad for any one year after its first construction and operation thereof will also forfeit all the interest of the party of the second part, in and to said strip of land and under this conveyance and the strip of land and all right and interest in and to anything conveyed hereby will forthwith be forfeited to and revert to the party of the first part its successors and assigns.

This conveyance is also made upon condition and agreement that the party of the second part its successors or assigns, shall within ninety days from the construction of said line of railroad, fence the same with a lawful fence and shall perpetually keep and maintain such fences and that the party of the first part, its successors and assigns shall have the right to designate six places along said line of railroad upon the strip of land hereby conveyed, at which the said party of the second part its successors and assigns shall construct and maintain grade crossings, with proper cattle guards on each side of said grade crossings, and shall construct and maintain the proper gates at such crossings all to be constructed and maintained in a substantial manner and in accordance with the usual custom of railroad Companies in regard thereto, but the party of the second part shall not be responsible for keeping said gates closed.

It is expressly understood and agreed by and between the parties hereto that the party of the second part, its successors and assigns shall construct a sidetrack upon said strip of land at some point in sections 15 or 21, and that the party of the second part shall select the same, and that the party of the first part its successors or assigns shall have the right to construct and perpetually maintain a warehouse adjacent to said sidetrack so the grain and produce may be loaded on said side track from said warehouse which said warehouse may be constructed any length not exceeding 150 feet, and shall be for the uses of the party of the first part and its successors and assigns in interest in the ownership of the land now owned by the party of the first part adjacent to and over which said strip of land is hereby conveyed by this conveyance and for the uses of the owner of the East half of section 25 township 18 North of range 36 E.W.M. and if the party of the second part, its successors in interest or assigns shall fail to construct said sidetrack within ninety days after the complete construction and commencing the operation of said line of railroad, the party of the second part its successors and assigns shall pay to the party of the first part its successors or assigns, the further sum of

of \$1000.00, and in the event of a failure to pay said sum should the same come due under the terms of this contract, then the party of the second part its successors and assigns will forfeit all its rights under and by virtue hereof and all interest in said land hereby conveyed and the same will forthwith revert to and become the property of the party of the first part its successors and assigns.

The party of the first part covenants, contracts and agrees that it will any time within four years from the date hereof in the event of the completion of said road sell and convey unto the party of the second part a tract of land not exceeding 160 acres in all, at the rate of \$10.00 per acres, which tract of lands to be conveyed shall adjoin said strip of land hereby conveyed, and shall be located in either sections 15 or 21.

A failure on the party of the party of the second part its successors or assigns to comply with any contract or agreement herein contained in its part to be kept and complied with, will forfeit all the right, title and interest of the party of the second part its successors or assigns in and to any and all property hereby conveyed and allright hereunder and the same will upon such failure revert to and become the property of the party of the first part, its successors and assigns.

In witness whereof, the party of the first part has caused these presents to be signed in its behalf by its President and Secretary and its corporate seal hereto attached in accordance with a resolution duly passed by the Board of Trustees of the party of the first part, authorizing said officers to make this conveyance upon the terms herein stated this 18th day of January 1907.



Walla Walla Live Stock Company

By H.R.Keylor

President.

By H.H.Turner

Secretary.

STATE OF WASHINGTON,)

SS.

County of walla Walla.)

On this 18th day of January 1907, before me personally appeared H.R.Keylor, and H.H.Turner, to me known to be the president and Secretary of the corporation that executed the within and foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument, and that the seal affixed is the corporate seal of said corporation.

In witness whereof, I have hereunto set my hand and affixed my official seal the day and year in this certificate first above written.

W.D.Gregory

Notary Public for Washington, residing

at Walla Walla, Washington.

Filed for record JAN 24, 1907 at 8 A.M.

C.E.Amsbaugh, County Auditor

By Florence Fowler, Deputy.

Appendix II

THIS INSTRUMENT, made this 30th day of January, A.D., 1918, by and between JOSEPH DAVIN and Marie DAVIN, his wife, as parties of the first part, and the CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY, a corporation of the State of Wisconsin, as party of the second part,

W I T N E S S E T H :

WHEREAS, by deed dated January 18, 1907, and recorded January 24, 1907, in the office of the County Auditor of Adams County, Washington, on page 361 of Volume 23 of Deeds, the Walla Walla Live Stock Company, a Washington corporation, conveyed unto the Chicago, Milwaukee & St. Paul Railway Company of Washington a strip of land one hundred (100) feet in width extending over and across from the east side to the south side of section fifteen (15), in township eighteen (18) north, of range thirty-seven (37) East, W.M., and from the east side to the west side of section twenty-one (21), township eighteen (18) north, of range thirty-seven (37) East, W.M. and from the north side to the west side of section twenty-nine (29), in township eighteen (18) north, of range thirty-seven (37) East, W.M. and from the north side to the west side of section thirty-one (31), township eighteen (18) north, of range thirty-seven (37) East, W.M. and from the east side to the north side of the west half (1/2) of section twenty-five (25), township eighteen (18) north, of range thirty-six (36) East, W.M., all in Adams County, Washington, which said strip of land was in said deed more particularly described; and

WHEREAS, it was in and by said deed, among other things, provided as follows:

"This conveyance and all rights thereunder are made upon the express condition and agreement that the said Chicago, Milwaukee and St. Paul Railway Company of Washington, its successors or assigns, shall complete the construction and put in operation the line of standard gauge railroad upon the strip of land hereby conveyed, within four years from the date hereof, and that a failure on their part so to do will forfeit all rights hereunder and the said land and privileges hereby granted will immediately be forfeited and revert to the party of the first part, its successors in interest or assigns, and that a failure to use and operate said line of railroad for any one year after its first construction and operation thereof will also forfeit all the interest of the party of the second part, in and to said strip of land and under this conveyance and the said strip of land and all right and interest in and to anything conveyed hereby will forthwith be forfeited to and revert to the party of the first part, its successors and assigns.

It is expressly understood and agreed by and between the parties hereto that the party of the second part, its successors and assigns shall construct a sidetrack upon said strip of land at some point in sections 15 or 21, and that the party of the second part shall select the same and that the party of the first part, its successors or assigns, shall have the right to construct and perpetually maintain a warehouse adjacent to said sidetrack so the grain and produce may be loaded on said sidetrack from said warehouse, which said warehouse may be constructed any length not exceeding 150 feet, and shall be for the uses of the party of the first part and its successors and assigns in interest in the ownership of the land now owned by the party of the first part adjacent to and over which said strip of land is hereby conveyed by this conveyance and for the uses of the owner of the East Half of Section 25, Township 18 North of Range 36 E.W.M., and if the party of the second part, its successors in interest or assigns shall fail to construct said sidetrack within ninety days after the complete construction and commencing the operation of said line of railroad, the party of the second part, its successors and assigns shall pay to the party of the first part, its

successors or assigns, the further sum of \$1000.00, and in the event of a failure to pay said sum should the same come due under the terms of this contract, then the party of the second part, its successors and assigns, will forfeit all its rights under and by virtue hereof and all interest in said land hereby conveyed, and the same will forthwith revert to and become the property of the party of the first part, its successors and assigns."

AND WHEREAS, said railway was constructed upon said strip of land within four (4) years from the date of said deed and has since been, and is, used and operated; and

WHEREAS, the said grantors herein have heretofore succeeded to all of the rights and interests of the said Walla Walla Live Stock Company in and to the lands described in said deed; and

WHEREAS, the Chicago, Milwaukee & St. Paul Railway Company, the grantee, has succeeded to all of the rights and interests of the said Chicago, Milwaukee & St. Paul Railway Company of Washington in and to said strip of land conveyed to it and in and to the railway constructed by the said Chicago, Milwaukee & St. Paul Railway Company of Washington;

NOW THEREFORE, the parties of the first part, for and in consideration of the sum of One Dollar (\$1.00) to them in hand paid, the receipt whereof is hereby acknowledged, and other good and valuable considerations to them moving from the said party of the second part, hereby release the said party of the second part, its successors and assigns from any and all further compliance whatsoever with the terms and provisions of those certain covenants contained in said deed of January 18, 1907, above quoted and particularly from the obligation to construct or maintain a sidetrack or other station facilities, or to permit the said parties of the first part to construct and maintain a warehouse adjacent to such sidetrack, and from any and all claim whatsoever by reason of any failure on the part of the said Chicago, Milwaukee & St. Paul Railway Company of Washington, its successors or assigns, to construct or maintain such sidetrack.

IN WITNESS WHEREOF, the parties of the first part have hereunto set their hands and seals the day and year first herein written.

Joseph Davin

Marie Davin

State of Washington)
County of Walla Walla) ss

I, the undersigned, a Notary Public in and for the County and State aforesaid, do hereby certify that on this 30th day of January, A.D. 1918, personally appeared before me Joseph Davin and Marie Davin, ^{Davin}his wife, to me known to be the individuals described in and who executed the foregoing instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this 30th day of January, A.D., 1918.

George W. Thompson

Notary Public in and for the State of Washington,
residing at Walla Walla therein



Recorded Apr. 12, 1918 at 8:25 A.M.

Laura Schragg, Co. Auditor

By Bessie Towers, Deputy

FISH, WILDLIFE, & PARKS DIVISION - ATTORNEY GENERAL'S OFFICE

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