Nos. 19-2078, -2080, -2090, -2316

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GARY E. ALBRIGHT, et al., *Plaintiffs-Appellants*
CLAUDE J. ALLBRITTON, et al., *Plaintiffs*
v.
UNITED STATES, *Defendant-Appellee*

PERRY LOVERIDGE, et al., *Plaintiffs*
NEAL ABRAHAMSON, et al., *Plaintiffs-Appellants*
v.
UNITED STATES, *Defendant-Appellee*

GARY E. ALBRIGHT, et al., *Plaintiffs*
DANIEL EARL HIGGINS, III, MICHAEL J. OPOKA, ZELDA L. OPOKA,
Plaintiffs/Appellants
v.
UNITED STATES, *Defendant-Appellee*

Appeals from the United States Court of Federal Claims
Nos. 1:16-cv-00912-NBF, 1:16-cv-01565-NBF, and 1:18-cv-00375-NBF
(Hon. Nancy B. Firestone)

CORRECTED ANSWERING BRIEF OF DEFENDANT-APPELLEE UNITED STATES

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The undersigned counsel is not aware of any pending related cases within the meaning of Circuit Rule 47.5.

INTRODUCTION

Congress enacted the National Trail System Act Amendments of 1983, 16 U.S.C. § 1247(d) (Trails Act), to promote the conversion of dormant rail corridors to recreational trails and thereby preserve the corridors for possible future rail service. In certain circumstances, the resulting "rails-to-trails" conversions may effect Fifth Amendment takings for which the United States is liable to pay just compensation. The threshold question is whether the plaintiff actually possesses a compensable property interest under applicable state law.

These consolidated appeals arise out of a 2016 rails-to-trails conversion in Oregon. In two opinions totaling nearly 250 pages, the Court of Federal Claims (CFC) analyzed each of the relevant deeds under Oregon property law. The CFC determined that the deeds conveyed fee simple title from Plaintiffs' predecessors-in-interest to the railroads, such that Plaintiffs have no compensable property interest on which to base takings claims. As elaborated herein, that determination was correct, and the CFC's partial summary judgment in favor of the United States should accordingly be affirmed.

STATEMENT OF JURISDICTION

(A) The CFC had subject matter jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1) because Plaintiffs' claims arose under the Just Compensation Clause of the Fifth Amendment to the United States Constitution.

(B) As to all claims at issue on appeal, the CFC entered final judgment against Plaintiffs under Rule 54(b) after expressly determining that there is no just reason for delay. This Court has jurisdiction under 28 U.S.C. § 1295(a)(3).

(c) The CFC entered partial judgment in all three cases on April 29, 2019. Appx254-259; Appx518-526. The Abrahamson and Bellisario Plaintiffs filed their notices of appeal on June 27, 2019, or 59 days later, and the Arent Fox Plaintiffs filed their notice of appeal from that judgment on June 28, 2019, or 60 days later. Appx6159-6161; Appx3186-3188. The CFC entered another partial judgment in all three cases on June 26, 2019. Appx261; Appx6158. The Arent Fox Plaintiffs filed their notice of appeal from that judgment on Monday, August 26, 2019, or 62 days later. Appx3189. The appeals are timely under Federal Rules of Appellate Procedure 4(a)(1)(B) and 26(a)(1)(C).

STATEMENT OF THE ISSUE

Whether the CFC correctly determined that each of the deeds at issue on appeal conveyed a fee simple estate under Oregon law, such that Plaintiffs associated with these deeds have no cognizable property interest on which to base Fifth Amendment takings claims.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes and regulations are set forth in the addendum following this brief.

STATEMENT OF THE CASE

A. Legal background

The federal government has regulated the nation's rail system since the Interstate Commerce Act of 1887. *See Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981). Congress conferred exclusive and plenary authority on the Interstate Commerce Commission (now the Surface Transportation Board, or STB) to regulate abandonment of nearly all of the nation's rail lines in the Transportation Act of 1920. *Id*. at 318; *see also* 49 U.S.C. §§ 10501(b), 10903. Under this longstanding authority, rail carriers under the STB's purview must "provide . . . transportation or service on reasonable request," *id.* § 11101(a), unless the STB agrees to a temporary discontinuance or a permanent abandonment of the rail line, *id*. § 10903. A discontinuance allows a rail carrier to "cease operating a line for an indefinite period while preserving the rail corridor for possible reactivation of service," whereas abandonment removes a line from the national transportation system altogether, terminating the railroad's financial and managerial responsibilities for the line. *Preseault v. ICC*, 494 U.S. 1, 5 n.3 (1990) (*Preseault I*).

Once the Board grants abandonment authority to a rail carrier, the carrier typically has one year to decide whether to consummate the abandonment, although an extension may be approved upon the carrier's request. 49 C.F.R. § 1152.29(e)(2).

The Board may exempt a rail line from formal abandonment proceedings under 49 U.S.C. § 10903, providing a streamlined and expedited process for its review; and it does so as a matter of course if a line has been dormant for at least two years. *See id.* § 10502(a); 49 C.F.R. § 1152.50.

In 1983, Congress added Section 8(d) of the Trails Act to create an additional option for railroads wishing to terminate rail service, known as "railbanking." When a rail corridor is railbanked, the Board retains jurisdiction over the corridor so that it may be returned to active railroad use in the future, but the rail carrier transfers financial and managerial responsibility to a government or private entity, allowing its use as a recreational trail in the interim. *See Preseault I*, 494 U.S. at 6-7. The provision ensures that corridors remain available for future rail use by preventing such corridors from being abandoned under state law: "if such interim [trail] use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes." 16 U.S.C. § 1247(d).

When a rail carrier applies to abandon a rail line, a "state, political subdivision, or qualified private organization" may express interest "in acquiring or using a right-of-way of a rail line . . . for interim trail use and rail banking." 49 C.F.R. § 1152.29(a). If the rail carrier agrees to negotiate with a potential trail sponsor, then the STB "will issue a Notice of Interim Trail Use or Abandonment [NITU] to the

railroad and to the interim trail sponsor for the portion of the right-of-way as to which both parties are willing to negotiate." *Id.* § 1152.29(d)(1). The NITU itself authorizes no trail use but rather provides a 180-day negotiation period (which may be extended), during which time the rail carrier may "discontinue service, cancel any applicable tariffs, and salvage track and materials" after 30 days. *Id*.

If the railroad and prospective trail sponsor reach an agreement, the parties notify the STB, after which the corridor is railbanked (remaining under the Board's jurisdiction), and the trail sponsor may convert the agreed upon segment of rail corridor to interim trail use. If the parties do not reach an agreement, the railroad has one year to decide whether to consummate abandonment of the line (which may be extended), just as it would have if no NITU had been issued. *Id*. §§ 1152.29(d)(1), (e)(2); *see also Citizens Against Rails to Trails v. STB*, 267 F.3d 1144, 1150-53 (D.C. Cir. 2001).

B. Factual background

The rail segment at issue is approximately 81 miles long and located between milepost 775.01 (near Banks, Oregon) and milepost 856.08 (near Tillamook, Oregon). Appx626; Appx635. In the early 1900s, two railroad companies acquired the property for the segment pursuant to numerous deeds, including the 132 deeds executed by Plaintiffs' predecessors-in-interest. Appx6. The Port of Tillamook Bay Railroad (POTB) eventually came to own the segment, which has been dormant

since December 2007, when it suffered catastrophic damage due to severe storms. Appx626-627.

In May 2016, POTB provided notice of its intention to terminate service over the segment. Appx626-629. POTB explained that it did not believe that it could obtain the necessary funding to repair the segment, and that it would continue to provide service over the balance of the line, between mileposts 774.0 and 775.01. Appx626-627. The following month, the Salmonberry Trail Intergovernmental Authority (STIA) asked the STB to issue a NITU for the segment, expressing its willingness to assume financial responsibility therefor. Appx630-631. After POTB stated that it was willing to negotiate with the STIA for interim trail use and railbanking, the Board issued the NITU on July 26, 2016. Appx641-643.

The STIA and POTB reached an interim trail use agreement on October 23, 2017, upon which the segment was railbanked.

C. Proceedings below

These three takings cases arise out of the same NITU and involve many of the same deeds. The *Loveridge* action, CFC No. 1:16-cv-912, was filed first, in August 2016. Appx554. The *Albright* action, CFC No. 1:16-cv-1565, was filed approximately three months later. Appx533. Finally, the *Aeder* action, CFC No. 1:18-cv-375, was filed in March 2018. Appx537. The CFC consolidated only *Albright* and *Aeder* because the Plaintiffs in *Abrahamson* were represented by

different counsel, but the court issued a single partial summary judgment opinion in all of the cases. Appx1-128.

Of the 132 deeds at issue, the parties agreed that 18 granted fee simple interests to the railroad, such that no Fifth Amendment taking occurred and the Plaintiffs associated with those deeds would be dismissed; and that 12 conveyed easements, such that the Plaintiffs associated with those deeds could continue in the litigation. Appx8-9. The CFC ruled on the parties' cross-motions for partial summary judgment on August 13, 2018, determining in a 128-page opinion that 94 of the remaining 102 deeds conveyed fee simple interests to the railroad, while the remaining eight conveyed easements. Appx1-128. The court expressly declined to reach any of the other issues raised by the parties, including whether the scope of any easement conveyed included interim trail use.

Plaintiffs moved for reconsideration as to 57 of the deeds that the CFC had determined conveyed fee simple estates. Appx129. On February 8, 2019, the CFC granted this motion in part, issuing a 119-page opinion holding that four additional deeds conveyed easements, such that the Plaintiffs associated with those deeds could proceed in the litigation. Appx129-246.

The CFC entered Rule 54(b) judgments in favor of the United States in all three cases on April 29, 2019. Appx254-259; Appx518-526. It entered another partial judgment in the United States' favor in all cases on June 26, 2019. Appx261;

Appx6158. These appeals followed and were consolidated by this Court. On November 7, 2019, this Court granted the Arent Fox Plaintiffs' motion to voluntarily dismiss 20 Plaintiffs from its appeals. ECF No. 61. The remaining Plaintiffs contest the CFC's judgment as to 26 deeds.

SUMMARY OF ARGUMENT

In Oregon, whether a railroad deed conveys a fee simple estate or an easement depends upon the intention of the parties. In ascertaining this intent, it is presumed that the parties intended to convey the entire estate, and the intent to pass a lesser estate must be expressly stated or necessarily implied in the terms of the grant. Plaintiffs are incorrect in arguing that this presumption does not apply, and that the presumption is supplanted or altered because the railroad had the power of eminent domain and surveyed and located its route before the deeds were executed. Both arguments are plainly refuted by a 1956 decision of the en banc Oregon Supreme Court, which applied the presumption in interpreting a railroad deed that was executed after the railroad was "located and established," and which attached no significance at all to this sequence of events. No Oregon case of which the United States is aware has ever attached any significance to a survey and location in interpreting a railway deed.

Applying the statutory presumption and guidance supplied by the Oregon Supreme Court, the 26 deeds at issue on appeal do not present close questions. The requisite intent must appear in the deeds' express terms because it is not necessarily implied by the mere fact of the survey and location, and Plaintiffs have made no argument that it is necessarily implied by any other term. All of the deeds convey land as opposed to a right to use the land for railroad purposes, and none of them provides for a reverter or otherwise expressly limits the interest transferred. The Court need go no further than these facts in affirming the judgments below.

In the alternative—and assuming arguendo that the presumption in favor of fee simple conveyances does not apply and that the intent to pass a lesser estate need not appear by the deeds' express terms—the 26 deeds at issue on appeal still convey the fee. Plaintiffs gamely attempt to compare and contrast their deeds with the deeds that are the subject of Oregon case law, but their attempts fail on both legal and factual grounds. As elaborated below, Plaintiffs misread the governing cases and mischaracterize their own deeds.

Finally, the Plaintiffs' contentions that a 2015 CFC decision, the railroad's own charter, and Oregon statutes governing the powers of corporations, compel a different conclusion miss the mark entirely.

The judgment of the Court of Federal Claims should be affirmed.

STANDARD OF REVIEW

In reviewing a decision of the CFC, this Court reviews legal conclusions de novo and factual findings for clear error. *Love Terminal Partners, LP v. United States*, 889 F.3d 1331, 1340 (Fed. Cir. 2018). Whether the United States has taken property is a legal question based on underlying facts. *Id*. The burden of proof for establishing the required elements of a takings claim lies on the plaintiff. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 493 (1987); *CCA Associates v. United States*, 667 F.3d 1239, 1253 (Fed. Cir. 2011); *Cienega Gardens v. United States*, 503 F.3d 1266, 1288 (Fed. Cir. 2007).

ARGUMENT

This Court has held that the establishment of a recreational trail—and the preclusion of an easement's reversion—may be the basis for a valid physical takings claim. *See Preseault v. United States*, 100 F.3d 1525, 1550 (Fed. Cir. 1996) (*Preseault II*). No taking occurs, however, if the claimant lacks a compensable interest in the allegedly taken property. *Id.* at 1533; *Preseault I*, 494 U.S. at 16. "Some rights of way are held in fee simple," such that the claimant has no reversionary interest in the right of way at all. *Id*. This Court and numerous others, including the Supreme Court of Oregon, have held that railroads acquired various rights of way in fee simple. *Chicago Coating, LLC v. United States*, 892 F.3d 1164, 1170 (Fed. Cir. 2018) (applying Illinois law); *Bouche v. Wagner*, 293 P.2d 203, 210

(Or. 1956) (en banc) (applying Oregon law); *see also* Jon W. Bruce and James W. Ely, Jr., *The Law of Easements and Licenses in Land* § 1.22 (2d ed. 2019) (collecting cases). Other rights of way are easements that do not revert upon a rails-to-trails conversion because their scope encompasses interim trail use. *Id.*[1]

Accordingly, to demonstrate that they have a compensable property interest, Plaintiffs in rails-to-trails takings cases must first and foremost establish that they actually possess a reversionary interest of the requisite scope. *See Caldwell v. United States*, 391 F.3d 1226, 1228 (Fed. Cir. 2004) (A rails-to-trails takings claimant must prove that "state law reversionary interests are effectively eliminated in connection with a conversion of a railroad right-of-way to trail use."); *Chicago Coating,* 892 F.3d at 1170 (same). To answer this question, the Court must apply the "law of the state where the property interest arises." *Id.*

I. Under Oregon law, the parties' intent is determinative of the interest conveyed, and it is presumed that the parties intended to convey the entire estate unless the intent to pass a lesser estate is expressly stated or necessarily implied.

In Oregon, "whether an instrument conveys ownership of land or only an easement depends upon the intention of the parties." *Bouche*, 293 P.2d at 208. In ascertaining this intent, it is presumed that the parties intended to convey the entire estate: "Any conveyance of real estate passes all the estate of the grantor, unless the

[1] The United States raised this issue in the CFC, but the court has not yet ruled on it, and it is not at issue in these appeals.

intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant." *Id.* (quoting O.R.S. § 93.120). This longstanding statutory rule existed in 1906 and through 1912, when the deeds at issue were executed. *See Bellinger and Cotton's Codes and Statutes of Oregon* § 5336, at 1710 (1902); *Lord's Oregon Laws* § 7103, at 2547 (1910); Oregon Laws § 9847, at 3528 (1920); *see also Ruhnke v. Aubert*, 113 P. 38, 40 (1911) (applying a prior version).[2] A related rule of construction applicable to all deeds is that they "are construed more strongly against the grantor," and conditions "defeating or limiting an estate are not viewed with favor." *Palmateer v. Reid*, 254 P. 359, 360 (Or. 1927); *see also First National Bank of Oregon v. Townsend*, 555 P.2d 477, 478 (1976) ("When there is doubt as to whether the parties intended that a deed transfer a fee simple or a lesser interest in land, that doubt should be resolved in favor of the grantee and the greater estate should pass.").

A. The statutory presumption in favor of fee simple conveyances applies to the deeds at issue on appeal.

The Abrahamson and Arent Fox Plaintiffs incorrectly assert that there is no presumption in favor of fee simple conveyances in Oregon, and compound their error by wrongly asserting that a constructional preference in favor of easements applies. Abrahamson Brief at 16; Arent Fox Brief at 7, 13-15. Their assertions are

[2]These statutes are reproduced in the Addendum to this brief.

flatly refuted by *Bouche*, in which the Oregon Supreme Court applied the statutory presumption in favor of fee simple conveyances in deciding that a railroad had acquired its right of way in fee simple. 293 P.2d at 208. It is also plainly refuted by O.R.S. § 93.120, which establishes that a "conveyance presumably passes the entire interest of the grantor." *Wiser v. Elliott*, 209 P.3d 337, 341 n.4 (Or. Ct. App. 2009) (citing statute and setting forth the presumption with respect to the interpretation of two railroad deeds but finding it unnecessary to decide the issue). Applying a prior version of the statute to a reservation in a deed that allowed the grantor to take water from an irrigation ditch, the Oregon Supreme Court explained that a conveyance is deemed to be of a fee simple estate absent express terms manifesting a different intent, and that plaintiffs have "the laboring oar to establish the proposition that some other or less estate was intended and this must be done, not de hors the deed but from the deed itself." *Ruhnke*, 113 P. at 40.

Nor do the contentions find any other support in Oregon law. The Abrahamson Plaintiffs rely on *Cappelli v. Justice*, 496 P.2d 209, 212 (Or. 1972), which stated that O.R.S. § 93.120 was not helpful in deciding the question before it and was principally enacted to abolish the ancient rule that the words "and his heirs" were necessary to create a fee simple. But the statement neither eliminated the presumption nor rendered it inapplicable. The practical consequence of removing the ancient "and his heirs" requirement in deeds is to create a presumption in favor

of fee simple conveyances. Moreover, *Cappelli* made the statement in the course of rejecting the argument that the statute inhibited "inquiry into the grantor's intent where he has used ambiguous language in his deed." *Id*. The United States makes no such argument here. This Court must determine the parties' intent regardless of whether the language is clear or ambiguous; in doing so, it must apply the statutory presumption that they intended to convey the fee unless the intent to convey something less is manifest in the deed's express terms.

The Abrahamson Plaintiffs also cite *Hall v. Meyer*, 527 P.2d 722, 724 (Or. 1974), for the proposition that a constructional preference in favor of easements "appears to" apply to all conveyances in Oregon. Abrahamson Brief at 16. The Oregon statute and cases cited above demonstrate to the contrary, and *Hall* casts no doubt on this weight of authority. *Hall* held that a reservation in a deed allowing the grantor to take water from a spring was an easement rather than a fee simple estate, which the court noted might not even be possible. 527 P.2d at 724. *Hall* cited the general rule that ambiguities in deeds are resolved against the grantor (and ultimately decided the case consistent with this principle), and it noted that in deciding whether an interest is a fee or an easement, "the generally prevailing attitude is favorable to the finding of an easement wherever that type of interest serves the manifested purpose of the parties." *Id*. (internal quotation marks omitted). Like the statement in *Cappelli*, this qualified statement is fully consistent with the statutory and

common law rule in Oregon that the entire estate is passed unless the parties, through express terms, manifest their intent to transfer something less.

Moreover, there is no support in Oregon law for the proposition that an easement is presumptively sufficient for railroad purposes. *Bouche* clearly demonstrates to the contrary. As acknowledged in *Cappelli*, a non-railroad case, decisions holding that railroads acquired their rights of way in fee simple are "explained on the ground that the broad use of the land by the railroad company contemplated by such conveyances indicates an intent to create more than an easement." 496 P.2d at 213. Similarly, the Oregon Court of Appeals explained in *Realvest Corp. v. Lane County*, 100 P.3d 1109, 1113 (Or. Ct. App. 2004), that right-of-way conveyances for public use are not in the nature of easements because, unlike such conveyances between private parties where the grantor and grantee typically share the area conveyed, the grantor's use of a public right of way is typically limited to that of the general public. And contrary to the Arent Fox Plaintiffs' suggestion, *Bouche* is not the only Oregon case recognizing that railroads acquired various rights of way in fee simple. *See State Highway Commission v. Deal*, 233 P.2d 242, 244, 249 (Or. 1951) (railroad acquired right of way in fee simple under deeds executed in 1918 and 1919); *Wiser*, 209 P.3d at 339 n.4 (three of five conveyances of a strip of land to a railroad in 1912 and 1913 "clearly conveyed fee ownership of the land to the railroad").

The Arent Fox Plaintiffs more boldly assert that there is a presumption in favor of construing right of way conveyances to railroads as easements because there is a "well-developed body of clear Oregon law" on the nature of the property interests acquired by railroads, and in all of these cases save one, the Oregon courts found these interests to be easements. Arent Fox Brief at 7. These Plaintiffs overstate the law and manufacture a presumption in favor of easements where there is none. Of the five cases cited, only three address whether a voluntary right of way conveyance to a railroad is a fee or an easement, and none states a constructional preference in favor of an easement. *Bernards v. Link*, 248 P.2d 341, 343-44 (Or. 1952) (reasoning that a single case, *Wason v. Pilz*, 48 P. 701 (Or. 1897), was determinative that the particular deed conveyed only an easement); *Powers v. Coos Bay Lumber Co.*, 263 P.2d 913 (Or. 1953) (holding, before *Bouche* was decided, that *Bernards* compelled the conclusion that the conveyance was only an easement with no analysis of the specific deed); *Bouche*, 293 P.2d at 203 (applying preference in favor of fee simple conveyances and holding that railroad acquired its right of way in fee simple).

Neither *Wason* nor *Cappelli*, which the Arent Fox Plaintiffs classify as part of this supposed "well-developed body of law," addressed a right of way conveyance to a railroad. Further, *Cappelli* distinguished cases holding that railroads had acquired rights of way in fee simple on the ground that the railroads' broad use of

the land indicates an intent to create more than an easement. 496 P.2d at 213. That rationale had no force with respect to the right of way at issue, which conveyed a strip of land connecting the grantee's land and a highway. *Id*. And *Egaas v. Columbia County*, 673 P.2d 1372 (Or. Ct. App. 1983), which the Arent Fox Plaintiffs likewise lump in this category, is inapposite because it addressed an eminent domain acquisition, which is governed by an entirely different set of rules in Oregon. *Id*. *Egaas* made this point clear when it rejected the County's reliance on *Bouche* because *Bouche* is a voluntary conveyance case. *Id*. at 1375. While the intention of the parties is determinative in voluntary conveyance cases like this one, it is irrelevant in determining what a railroad acquired via eminent domain. *See id*. For similar reasons, the Bellisario Plaintiffs' reliance on *Oregon Railway & Navigation Co. v. Oregon Real Estate Co.*, 10 Or. 444, 445 (1882), is misplaced. The decision addresses an eminent domain acquisition, not a conveyance by deed.

B. *Bouche* and *Bernards* illustrate how the Oregon Supreme Court has interpreted two very different railroad deeds.

Bouche and *Bernards*, the only two cases in which the Oregon Supreme Court has construed railroad deeds, illustrate how that court has interpreted two very different railroad deeds. More recently, in *Bouche*, the en banc Oregon Supreme Court examined a railway deed and concluded that it conveyed a fee simple estate. 293 P.2d at 208-10. The court set forth the governing analysis, including the presumption in favor of fee simple conveyances set forth above. *Id*. at 208. It also

canvassed the case law and explained that generally, the courts have had little difficulty concluding that a deed conveying land to a railroad creates only an easement when the "grant is a use to be made of the property, usually, but not invariably, described as for use as a right of way in the grant." *Id*. at 209.

All of the Plaintiffs have cited this language, but none has set forth the court's full analysis. "On the other hand," *Bouche* explained, "the general rule concerning the grant of land to a railroad as distinguished from the grant of a right or use thereof" is that railroad conveyances that refer to a "strip, piece, parcel, or tract of land" and *do not* contain language relating to the purpose or use to which the land is to be put, or otherwise "limiting, directly or indirectly, the estate conveyed, *are usually construed as passing an estate in fee*." *Id*. (emphasis added and internal quotation marks omitted). *Bouche* also addressed an apparent "divergence of opinion" when a railroad conveyance "merely has a reference to the use or purpose to which the land is to be put, and which is contained in either the granting or habendum clause, and, except for the reference, would uniformly be construed as passing title in fee." *Id*. This divergence stemmed from a failure of some courts to recognize that "right of way" has a twofold meaning; sometimes it describes a right belonging to a party, but sometimes it simply describes the parcel of land conveyed. *Id*.

In that light, *Bouche* set forth the characteristics of the deed before it:

> The conveyance is not entitled (1) a right of way deed; (2) the granting clause conveys land, not a right; (3) the consideration was substantial ($650); (4) there is no reverter provided for; (5) the words 'over and across the lands of the grantors' do not appear; and (6) the land conveyed is described with precision.

Id. The court noted that the deed contained an incidental reference to a "right of way" in the covenant following the granting and habendum clause. But because no language limited the use that the railroad could make of the land, and because the deed "in every other particular" stated the conveyance of the fee, the railroad had acquired the fee. *Id.*

The analysis in *Bernards*, the earlier case, was more truncated. The court there quoted extensively from the deed before it, with the exception of the description of the premises which it omitted. 248 P.2d at 342. It then "observed from the deed before it" that

> (1) [the deed] was entitled 'Right of Way Deed'; (2) a conveyance of the strip was made 'for use as a right of way'; (3) the consideration was only $1; (4) the conveyance was subject to a condition subsequent which revested all title in the grantors in the event the stipulated condition occurred; (5) the grantees were required to construct for the use of the grantors a cattle crossing; (6) the description included the phrase 'over and across and out of the land of the grantors; (7) the phraseology employed repeatedly the term 'strip of land'; (8) the grantee was required to 'build and keep in repair a good and substantial fence along each side of the strip.'

Id. at 343.

Bernards found *Wason* to be determinative. *Id*. at 344. *Wason*, as mentioned above, is a non-railroad case holding that a deed conveying a strip of land "for the purposes of a road" that required the grantee to enclose the road "by a good substantial board fence" created only an easement. 48 P. at 701. *Wason* stated that "the words 'a parcel of land for road purposes' are indicative of an easement only, and are controlling as the measure of the estate granted." *Id*. *Bernards* opined that the dissimilarities between the *Wason* deed and the deed before it "are more indicative of an intention to grant an easement than to convey the fee," but it did not further explain its conclusion. 248 P.2d at 344.

C. The presumption is not supplanted, and the requisite intent is not implied, merely because Oregon granted railroads the power of eminent domain and the railroad surveyed and located its route before the deeds were executed.

Before turning to the specific deeds, it is important to dispel the notion that ascertaining the parties' intent is irrelevant or that the necessary intent is implied merely because Oregon granted railroads the power of eminent domain and the deeds at issue were executed after the railroad had surveyed and located its route. The Abrahamson Plaintiffs and the amici contend that these facts are determinative of the conclusion that the railroad acquired only easements; the Arent Fox Plaintiffs assert that these facts create a strong presumption in favor of easements; and Bellisario Plaintiffs contend that Oregon law requires these facts to be taken into

account in the analysis. Abrahamson Brief at 16-23, Amicus Brief at 11-20. Arent Fox Brief at 8-11, Bellisario Brief at 19-21. None of these contentions is correct.

The Plaintiffs and amici rely primarily on *Preseault II* in advancing these arguments, but there this Court applied *Vermont* law to determine the interests that a railroad had acquired by eminent domain and by a voluntary conveyance. 100 F.3d at 1534-37. As to the voluntary conveyance, the Court concluded, "despite some uncertainties in the matter," that the railroad had acquired an easement. *Id*. Part of the problem was that the Vermont cases were "quite old," but the Court nonetheless found two to be particularly instructive. *Id*. The first was *Hill v. Western Vermont Railroad*, 32 Vt. 68 (1859), which held that regardless of whether a railroad acquires property by eminent domain or deed, an implied limitation restricts the interest it obtains to that necessary for its public purposes, and that an easement was sufficient. 100 F.3d at 1536. The second was *Troy & Boston Railroad v. Potter*, 42 Vt. 265 (1869), which held that notwithstanding a dispute about whether the deed before it had been properly executed and recorded, the railroad had acquired an easement because it had surveyed and located the railroad, and those acts constituted the exercise of eminent domain. 100 F.3d at 1536 (internal quotation marks omitted). Based on this case law, the Court held that the railroad acquired only an easement. *Id*.

In short, *Preseault II* construed the Vermont cases as implying a reversionary interest whenever a grantor conveyed land to a railroad after that land had been surveyed and could have been acquired via eminent domain, notwithstanding the absence of any limiting language in the subject deeds. Notably, however, the Vermont Supreme Court has since clarified to the contrary, explaining that to the extent that *Preseault II* "holds that a location survey automatically converts a subsequent fee-simple conveyance into an easement, we know of no law in Vermont or elsewhere to support such a claim." *Old Railroad Bed, LLC v. Marcus*, 95 A.3d 400, 403 (Vt. 2014); *see also Gregory v. United States*, 101 Fed. Cl. 203, 210 (2011) (rejecting argument based on *Preseault II* that a survey and location precluded a subsequent fee simple transfer to a railroad because there is "no [such] rule in Mississippi"); *Miller v. United States*, 67 Fed. Cl. 542, 545 (2005) (reaching the same conclusion as to Missouri law). The Vermont Supreme Court further explained that it

> found no support for defendants' assertion that, merely by virtue of the location survey referenced in the original deeds, the properties here were necessarily acquired by eminent domain. Nor do we find any other record evidence demonstrating that the deeds were made under such a climate of compulsion that they acquired the character of a condemnation proceeding, thereby conveying only easements rather than fee simple interests. The trial court found that the claim was "entirely speculative," and the record fully supports this conclusion.

Old Railroad Bed, 95 A.3d at 405.

The Bellisario Plaintiffs are also incorrect in their assertion that the treatise *Redfield on Redways* and Vermont law generally support the proposition that railroads could only acquire easements by deed. Bellisario Brief at 23-25. To the contrary, the treatise cites *Page v. Heineberg*, 40 Vt. 81, 86 (1868), which holds that a railroad owned its right of way in fee simple, to explain that although some cases seem to have implied such a limitation, "it seems now to be considered that railway companies may acquire the absolute fee in land by purchase and deed in fee-simple, and the title will remain in the company after it has changed the location of its road, and ceased to use it for corporate purposes." Isaac F. Kinney & J. Kendrick Redfield, *Redfield on Railways* 268 and n.3 (6th ed. 1888); *see also* Appx1947.

Importantly here, Oregon law provides no support for the proposition. To the contrary, it is clear from the applicable statutory presumption and *Bouche* that the requisite intent to limit a conveyance is not implied in railroad deeds simply because the railroad had the power of eminent domain and surveyed and located its route before acquiring rights of way pursuant to voluntary conveyances. *Bouche* had the opportunity to announce such a rule, as the deed it construed was executed after the railroad was "located and established," but it plainly did not. 293 P.2d at 206. Although this Court cited *Bernards* for the proposition that Oregon law is in accord with Vermont law in *Preseault II*, 100 F.3d at 1535 n.10, the Oregon Supreme Court actually did not apply any such rule in that or any other case. Nor have we found

any case in which an Oregon court interpreting a railway deed has attached any significance at all to this sequence of events.

Finally on this point, the Plaintiffs' arguments that the railroad lacked the power to acquire rights of way in fee simple, or that the requisite intent must be implied because the deeds were executed after the railroad surveyed and located its route, are strongly undermined by their own stipulations in these cases that the railroad in fact acquired numerous rights of way in fee simple.

At bottom, to accept any of the Plaintiffs' arguments regarding the interpretation of deeds would work a substantial modification of Oregon law. This Court should reject Plaintiffs' invitation to do that: the Court's acknowledged responsibility in these cases is "to apply established law, not to make new law." *Preseault II,* 100 F.3d at 1544.

II. Applying the statutory presumption, all of the deeds conveyed fee simple title because they do not expressly state the intent to convey anything less.

As explained above, the statutory presumption in favor of fee simple conveyances applies; under that presumption, a deed conveys the grantor's entire estate "unless the intent to pass a lesser estate appears by express terms, or is necessarily implied." O.R.S. § 93.120. To the extent that any Plaintiffs suggest that the requisite intent is "necessarily implied" by the fact that the railroad had the power of eminent domain and surveyed and located its route before the deeds were

executed, that argument is unavailing for the reasons explained above. Moreover, Plaintiffs have made no argument that the intent is necessarily implied by any other circumstance, and any such argument is forfeited. Accordingly, in its analysis of the specific deeds, the Court should go no further than the fact that none of them contains express terms manifesting the intent to convey an easement. In this critical respect, all of the deeds are similar to the *Bouche* deed and unlike the *Bernards* deed.

A. All of the deeds convey land, not a right to use the land for railroad purposes.

The two obvious places where the intent to limit a conveyance might be stated in a deed are the granting and habendum clauses; of these, the granting clause is more important. It is well-established that, while all of the language in a deed should be given effect, "the estate conveyed by the granting clause will prevail" if there is an irreconcilable conflict between that clause and other parts of a deed. *Palmateer*, 254 P. at 361; *accord First National Bank of Oregon*, 555 P.2d at 478. Consistent with this principle, the most important consideration in both *Bouche* and *Bernards* was whether the deed's operative granting language conveyed land or a right to use land for a specific purpose. *Bouche*, 293 P.2d at 209-10; *Bernards*, 248 P.2d at 344.

Here, the granting clauses of all of the deeds at issue on appeal convey land, not a right to use the land for railroad purposes. Specifically, 16 of the 26 deeds provide with only minor grammatical differences that the grantor or grantors "bargain, sell, grant, convey, and confirm to Pacific Railway and Navigation

Company . . . and to its successors and assigns forever, *all of the following described real property*" (emphasis added).[3] The Goodwin deed uses the same language except that it omits "all of." Appx1310. The Bryden deed similarly provides that the Brydens "grant, bargain, sell and convey unto . . . Pacific Railway Navigation Company[,] its successors and assigns, *all the following bounded and described real property*." Appx1234 (emphasis added). The remaining eight deeds use slightly different language that nonetheless makes clear that the subject of the conveyance is land, not a right.

The Galvani, Friday, Hagen and Stowell deeds provide with only minor grammatical differences that the grantors "grant, bargain and sell, convey and confirm . . . *all that certain lot, piece, parcel and track of land, lying, being and situate in* . . ." (emphasis added). Appx1300; Appx1296; Appx1312; Appx1473. The Gattrell, Woodbury 16/481, and Rupp deeds provide, again with only minor grammatical differences, that the grantors "bargain, sell, grant, convey and confirm

[3] We identify the deeds by the grantor's name only, except where the grantor executed more than one deed, in which case we also identify the book and page numbers. These 17 deeds are the Beals deed (Appx1219); the Burgholzer deed (Appx1238); the Cummings deed (Appx1263); the DuBois deed (omits "of") (Appx1281); the Jeffries deed (Appx1357); the Rinck deed (Appx1438); the Slattery deed (Appx1462); the Smith deed (Appx4871); the Thayer deed (Appx1478); the Watt 12/343 deed (Appx4812, Appx1500); the Watt 12/344 deed (Appx1502); the Watt 12/345 deed (Appx1504); the Westinghouse deed (Appx1510); the Wheeler Lumber 16/3 deed (Appx2133); Wheeler Lumber 16/5 deed (omits "of") (Appx4773), and the Wilson deed (Appx1524).

. . . *a strip of land*" (emphasis added), and the Woodbury 23/399 deed differs from these three only in that the first phrase is instead "bargain, sell, transfer and convey." Appx1302; Appx4864; Appx1526; Appx1446; Appx4829; Appx1528.

In short, the operative granting language in all of the deeds plainly identifies land as the subject of the conveyance as opposed to a right of way across the land for railroad use. All of the clauses are even stronger in this respect than the granting clause considered in *Bouche*, which provided that the grantors "have bargained and sold and by these presents do bargain, sell and convey unto [the grantee] *the following described premises*." 293 P.2d at 206 (emphasis added). By contrast, they are all a far cry from the granting clause considered in *Bernards*, which provided that the grantors "do hereby grant, bargain, sell and convey unto the said grantee and unto its successors and assigns, *for its use as a right of way for a railroad, a strip of land*." 248 P.2d at 342 (emphasis added).

Plaintiffs' arguments that some of the deeds conveyed a right as opposed to land are tenuous at best. The Abrahamson Plaintiffs contend that the Smith deed conveyed a right as opposed to land because, despite expressly granting "*all of the following real property situate in . . .*," the description of this real property states toward the end that "*said right of way hereby conveyed* shall be only 65 feet wide being 50 feet on the Easterly side and 15 feet on the Westerly side of said center line." Appx4871-4872 (emphasis added), *cited in* Abrahamson Brief at 23-24. The

Bryden and Stowell deeds similarly use the phrase "right of way" in their descriptions of the property conveyed; the Stowell deed uses the phrase three times. Appx1234; Appx1473; *see also* Bellisario Brief at 37, 39.

But like the right of way language in the *Bouche* deed, the "right of way" language in these deeds is used to describe the land itself, and not to limit the interest conveyed. As the Court explained with respect to exactly this language in *Bouche*, while the phrase can describe a right of passage, it is "often used to otherwise indicate that strip which the railroad company appropriates for its use," and it is important to distinguish the two meanings. *Bouche*, 293 P.2d at 209 (quoting *Territory of New Mexico v. United States Trust Co*., 172 U.S. 171, 183 (1898)). In these deeds, the phrase is used in the descriptions of the land conveyed (a portion of the deed that is not even set forth in the *Bernards* decision) and not in the far more significant granting clauses and not even in the habendum clauses. Under *Bouche*, the incidental uses of the phrase in these deeds does not operate to limit the interest transferred. *Id*. And even if these phrases did suggest such an intent, which they do not, that fact would render the descriptions of the property inconsistent with the granting clauses, in which case the granting clauses would prevail. *See Palmateer*, 254 P. at 361.

Nor is there any merit to the Arent Fox Plaintiffs' suggestion that the "Railway Deed" title of the Beals, Thayer and two Watt deeds operated to convey a right as opposed to land. Arent Fox Brief at 26-27. *Bernards* observed that the deed before it was entitled "Right of Way Deed," but it is not clear that the court attached much, if any, significance to this title. *See* 248 P.2d at 343 (mentioning title in its description of the deed but basing its decision on the operative granting language). In any event, "Railway Deed" is plainly not the same as "Right of Way Deed," and the former has no apparent significance given that railroads plainly had the power to acquire their rights of way in fee simple or as easements. Again, to the extent that the title of these deeds is inconsistent with their granting clause, the granting clauses prevail. *See Palmateer*, 254 P. at 361.

Therefore, the fact that all of the deeds convey land—and not a right to use land—strongly supports the conclusion that they transferred fee title.

B. None of the deeds provides for a reverter or otherwise limits the railroad in the use that it might make of the land.

It is also significant that none of the deeds provides for a reverter or contains other language expressly limiting the estate conveyed. In this important respect too, the deeds are analogous to the *Bouche* deed and distinguishable from the *Bernards* deed.

A comparison of the deeds at issue on appeal with the *Bernards* deed is instructive. Following the description of the premises, the latter specified that the grantee was required to construct a railroad on the subject land by a specific date, and it provided that if the grantee failed to do so, "this grant shall become null and void, and the title to said strip so conveyed shall revert to said grantors and their successors in interest." *Bernards*, 248 P.2d at 342. This limitation was also reinforced in the habendum clause, which provided that the estate was "conveyed unto the said grantee and its successors and assigns forever, but subject to the provision for reversion hereinabove set out." *Id*.

By contrast, 25 of the 26 deeds here specify—immediately following the description of the land where a limitation would normally be found if the parties wanted to include one—that the land is conveyed together with all appurtenances, tenements and hereditaments.[4] Again, this language is broader than the comparable language in the *Bouche* deed, which provided simply that the premises conveyed "with their appurtenances." 293 P.2d at 206. No language to this effect was present in the *Bernards* deed.

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[4] Appx4872; Appx1469; Appx4773; Appx4812; Appx1500; Appx4864; Appx1524; Appx1526; Appx4864; Appx1473; Appx1438; Appx1357; Appx1234; Appx1312; Appx1300; Appx1219; Appx1238; Appx1263; Appx1302; Appx1281; Appx1296; Appx1310; Appx1446; Appx1463; Appx1478; Appx1502; Appx1504; Appx1510; Appx2134; and Appx1524. The one deed that contains no such clause is the Woodbury 23/399 deed. Appx4829; Appx1528.

Most of the deeds contain a simple sentence to this effect, but eight contain more specific language confirming the breadth of the interest conveyed. The Stowell, Hagen, Galvani, and Friday deeds clarify that "the reversion and reversions, remainder and remainders, rents, issues, and profits thereof" also convey. Appx1473; Appx1312; Appx1300; Appx1296. The Bryden deed specifies that the land is conveyed with the tenements, hereditaments and appurtenances "and also all their estate, right, title and interest in and to the same, including dower and claim of dower." Appx1234.

The Goodwin, Slattery, and Rinck deeds specify that the right to operate a railroad is also conveyed, and the Rinck deed additionally states expressly that it transfers the fee. Plaintiffs' argument that the right-to-operate-a-railroad language in these deeds weighs in favor of finding an easement is without merit. As the CFC correctly noted, this language is found in deeds (including the Rinck deed) that expressly convey fee simple title. Moreover, the language is plainly used in each of these deeds to confirm that the conveyance *includes* this right, and not to limit the interest conveyed to this right. Respectively, the Goodwin, Slattery, and Rinck deeds provide that the land is conveyed with

> the appurtenances tenements and hereditaments thereunto belonging or in anywise appertaining, *together also* with the right to maintain and operate a railroad thereover.
>
> the appurtenances, tenements and hereditaments thereunto belonging, or in any wise [sic] appertaining, *with* the right to construct, maintain and operate a railway thereover.
>
> the appurtenances, tenements and hereditaments thereunto belonging or in anywise appertaining, *granting also* the grantee the right to operate a railway line thereover *as well as the fee of the aforesaid premises*.

Appx1310 (emphasis added); Appx1463 (emphasis adde); Appx1438 (emphasis added). Had the parties intended to transfer only an easement for railroad purposes, they would not have characterized this right as an interest additional to the land, appurtenances, tenements and hereditaments conveyed; rather, they would have characterized it as the sole interest conveyed.

The Abrahamson Plaintiffs contend that in the Smith deed, the "right of way" language found within the description of the property operated as an express limitation on the interest conveyed; but for the reasons explained above (pp. 28-29), it did not. Abrahamson Brief at 23-24; *see also* Appx4871-4872. For the same reasons, the right of way language in the Bryden and Stowell deeds does not express the requisite intent to limit the estate conveyed. *See* Bellisario Brief at 37, 39. In all of these deeds, the language is used merely to describe the geographic location of the property, and it does not suggest any limitation on the uses that the railroad may make of the property. Appx1234; Appx1473-1474.

Nor do the habendum clauses contain any express limitations. With minor variations and with the exception of the Rinck deed, which contains no traditional habendum language, these clauses provide that the land is conveyed to the railroad and to its successors and assigns forever.[5] Similar to the granting clauses, most contain a simple sentence to this effect, but some contain additional language confirming the breadth of the grant. Here, four more deeds specify that the grant includes the right to operate a railroad; but like the three deeds cited above, the language in each of these deeds plainly confirms that the right is included within the estate conveyed, and not that it is the sole interest conveyed. The Wheeler Lumber 16/5 and DuBois deeds provide:

> To Have and to Hold to the above named grantee and to its successors and assigns forever; the grantors *confirming also* to the grantee, its successors and assigns, the right to build, maintain and operate a line of railway thereover.

Appx4773 (emphasis added); Appx1281-1282 (emphasis added). The Wheeler Lumber 16/3 deed contains the same language but omits the second "its successors and assigns." Appx2134. The Gattrell deed similarly provides:

> To have and to hold unto the [above named] grantee and to its successors and assigns forever, *confirming to the grantee likewise* the right to build, maintain and operate a railway line thereover.

[5] Appx4872; Appx1469; Appx4773; Appx4812; Appx1500; Appx4829; Appx1500; Appx4864; Appx1526; Appx1473; Appx1302; Appx1511; Appx1358; Appx1234; Appx1312; Appx1263; Appx1300; Appx1219; Appx1238; Appx1281; Appx1296; Appx1310; Appx1446; Appx1463; Appx1478; Appx1502; Appx1504; Appx2134; Appx1524; Appx1356; Appx1528; Appx4829.

Appx1302 (emphasis added).

Accordingly, there is no conflict here between the granting and habendum clauses. All of the deeds at issue on appeal unambiguously grant land as opposed to a right to use the land for railroad purposes, and none of them contains an express limitation on the uses the railroad might make of the land.

For the foregoing reasons, none of the deeds expressly states the requisite intent to limit the interest conveyed and, accordingly, they all conveyed the fee.

III. Even if the presumption in favor of fee simple conveyances does not apply, and even if the intent to limit the conveyances to easements need not be expressly stated, all of the deeds conveyed the fee.

Plaintiffs contend that the deeds at issue on appeal contain "enough" of the eight characteristics set forth in *Bernards*—and by contrast, sufficiently few of the characteristics set forth in *Bouche*—to limit the conveyances to easements. Abrahamson Brief at 35, Arent Fox Brief at 7, 13-15, Albright Brief at 33. They are incorrect on two levels.

First, *Bernards* relied primarily on the fact that the deed expressly limited the interest conveyed to a right, and it did not hold that anything less than all of the characteristics it identified would be sufficient even in that circumstance, much less in the case of deeds like the ones at issue here, which contain no express limitations. The court plainly did not state that a majority of the remaining characteristics are sufficient in this factual scenario (as the Abrahamson Plaintiffs suggest) or that any

one characteristic is sufficient (as the Arent Fox Plaintiffs contend). Abrahamson Brief at 35, Arent Fox Brief at 7, 13-15. Although *Bernards* did not expressly state the statutory presumption, that presumption was the law at the time of the decision, and the deed construed in that case (unlike any of the deeds at issue in these appeals) clearly contained express terms sufficient to overcome the presumption.

Second, Plaintiffs have inaccurately identified the *Bernard* characteristics and in turn erred in their assertions that particular deeds contain them. At bottom, the only characteristic that any of the deeds here share with the *Bernards* deed is that they recite nominal consideration, and this is true only of 17 deeds. But this recital alone is not sufficient to find the requisite intent to limit the conveyances to easements for multiple reasons, including that it does not establish that nominal consideration was actually given but may instead signal that the real consideration was concealed. Contrary to Plaintiffs' arguments, all of the deeds are similar to the *Bouche* deed, and distinguishable from the *Bernards* deed, in all material respects. Nine of the deeds possess all of the characteristics that the Court found to be indicative of a fee in *Bouche*, and 17 possess all but one of these characteristics.

A. Nine of the deeds contain all six of the characteristics that were present in the *Bouche* deed and deemed significant by the Oregon Supreme Court, and the remaining 17 deeds contain all but the "substantial consideration" characteristic.

As set forth above, all of the deeds at issue on appeal convey land as opposed to a right to use the land for railroad purposes, and they do not provide for a reverter or contain any other express limitation on the estate conveyed. Thus, they all contain the second (and most important) and fourth characteristics identified in *Bouche* as indicative of a fee. 293 P.2d at 209. Further, all contain at least three of the remaining four *Bouche* characteristics weighing in favor of a fee, and nine contain all four of these characteristics. In particular, none of the deeds is entitled "Right of Way" deed (characteristic number 1); none of the deeds contains the language "over and across the lands of the grantors" (characteristic number 5); and all of the deeds describe the land conveyed with precision (characteristic number 6). *Id.*[6] Nine of the deeds also expressly provide that the consideration was substantial, which is characteristic number 3. *Id.*[7]

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[6] Appx4871-4872; Appx1468-1469; Appx4773-4774; Appx4812; Appx1500; Appx4829; Appx1528; Appx4864; Appx1526; Appx1473-1474; Appx1438; Appx1302-1303; Appx1510-1511; Appx1357-1358; Appx1234; Appx1312-1313; Appx1263; Appx1300; Appx1219-1220; Appx1238; Appx1281-1282; Appx1296; Appx1310; Appx1446; Appx1462-1463; Appx1478; Appx1502; Appx1504; Appx2133-2134; and Appx1524.

[7] These nine deeds are the Smith deed ($150 consideration), Appx4871; Appx1468; the Woodbury 16/481 deed ($10 consideration), Appx4864, Appx1526; the Stowell deed ($50 consideration), Appx1473; the Bryden deed ($22.05 consideration),

In sum, nine of the deeds contain all six of the characteristics that were present in the *Bouche* deed and deemed significant by the Court, and the remaining 17 deeds contain all but the "substantial consideration" characteristic, a distinction that is not alone sufficient to demonstrate the requisite intent for reasons explained below. Considered in relation to *Bernards*, 17 deeds have none of the characteristics of the *Bernards* deed, and nine only have in common the recitation of nominal consideration.[8] Plaintiffs' various arguments that certain deeds do not actually possess these characteristics, or possess other characteristics that are significant under *Bernards*, are unavailing.

Appx1234; the Cummings deed ($217 consideration), Appx1263; the Friday deed ($25 consideration), Appx1296; the Goodwin deed ($350 consideration), Appx1310; the Rupp deed ($10 consideration), Appx1446; and the Slattery deed ($10 consideration), Appx1462.

[8] One of the eight characteristics identified in *Bernards* was that the grantees were required to construct for the use of the grantors a cattle crossing. 248 P.2d at 343. Plaintiffs have made no argument that any of the deeds contain an analogous provision and have accordingly forfeited that argument. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) (arguments not raised in the opening brief are forfeited). Nonetheless, we note that the Galvani deed contained, in the description of the land conveyed, a reservation of "grade farm crossings at two points to be selected by the [grantee]." Appx1300. This language does not weigh in favor of an easement, as the *Bouche* deed contained a similar reservation of "reasonable crossings over and under the railroad right of way," and the court afforded that fact no significance. 293 P.2d at 206, 210. Moreover, the *Bouche* deed provided that the crossings were provided as "a part of the consideration for this conveyance," raising the possibility that the provision of a crossing was likewise part of the consideration paid for the Galvani tract. *Id*. at 206. As explained below (pp. at 46-47), the fact that the deed states that the consideration was $1 does not establish that $1 was the actual consideration paid.

1. None of the deeds contains the phrase "over and across the lands of the grantors," or equivalent language.

First, the Plaintiffs err in arguing that the word "through" (which is used in 20 of the deeds) or "across" (which is used in five deeds) is significant under Oregon law.[9] Abrahamson Brief at 27-28, Arent Fox Brief at 27-28, Bellisario Brief at 36. Plaintiffs appear to equate these words with the phrase "over and across and out of the land of the grantors," which present in the *Bernards* deed, 248 P.2d at 343; or the slightly abbreviated "over and across the lands of the grantors," which *Bouche* specifically mentioned was absent, 293 P.2d at 209. But we have found no Oregon case, and Plaintiffs have cited none, supporting their proffered expansion of this characteristic. Moreover, the *Bouche* deed contained the language "over and across said lands," but the court attached no significance to that language.[10] As mentioned previously, the Court's responsibility here is to apply established law, not to make new law. *Preseault II*, 100 F.3d at 1544.

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[9] The Stowell, Bryden, Hagen, Galvani, and Wilson deeds use the word "across." Appx1473; Appx1234; Appx1312; Appx1300; Appx1296; Appx1524. The Friday deed uses neither term. The remaining deeds use "through." Appx4871; Appx4773; Appx4812; Appx1500; Appx4829; Appx1528; Appx4864; Appx1526; Appx1438; Appx1302; Appx1510; Appx1357; Appx1263; Appx1219; Appx1238; Appx1281; Appx1310; Appx1446; Appx1462; Appx1478; Appx1502; Appx1504; Appx2133; Appx1524.

[10] The Arent Fox Plaintiffs erroneously suggest that some of the deeds contain "over" or "over and across." Arent Fox Brief at 25. None contains even this language.

Nor do any of the deeds possess even a close approximation of the relevant language. The words "through" and "across" are similar to the phrase "right of way" in that, even assuming that they *could* be suggestive of an easement, they could also be used simply to describe a geographic location. Both words are perfectly suited to this purpose in this context, where the land conveyed is a strip that does not border other land but instead cuts "through" or "across" it.

This interpretation is the most plausible here, as all of the deeds that contain "through" or "across" do so only in the description of the land conveyed. By contrast, the *Bernards* deed used the phrase "over and across and out of the land of the grantors" in the granting clause. 248 P.2d at 342.[11] Ultimately, *Bouche* requires the context in which words are used to be taken into account, 293 P.2d at 209, and it would be inconsistent with the decision to ascribe any significance to "through" or "across" as they are used in the deeds here.

2. All of the deeds precisely describe the land conveyed.

The Plaintiffs also erroneously assert that Smith, Wheeler Lumber 16/5, Watt 12/343; Woodbury 23/399, DuBois, Rupp, Thayer, Cummings, Gattrell, and Jeffries deeds do not describe the land conveyed with precision. Abrahamson Brief at 29-

[11] *Bernards* did not set forth most of the deed's description of the land conveyed, presumably not finding this language to be significant. *Id*. The *Bernards* deed also contained the phrase "over and across" in the reversionary clause, but the court did not specifically mention that language.

32, 38; Arent Fox Brief at 18, 30, 33; Bellisario Brief at 35-36, 37-40. The CFC originally found this characteristic to be of limited value because all of the deeds describe the land with some specificity. Appx14. On reconsideration, however, the CFC correctly determined that this characteristic weighs in favor of finding that the deeds conveyed fee title. Appx16; Appx235; Appx277; Appx155-156; Appx205; Appx217; Appx197; Appx201; Appx141-142; Appx145-146; Appx188-189.

As explained by the *Restatement*, because the owner of an estate (as opposed to an easement) has, "presently or prospectively, the privilege and the right to occupy a certain space, a conveyance creating an estate must indicate the space to be occupied." *Restatement (First) of Property* § 471 (1944). This may be done

> *in any of many different ways*. It may be indicated by reference to monuments on the surface of the ground *or by reference to an area to be located by survey with reference to a known point or points*. Whatever form a conveyance of less than all of the conveyor's land may take, whether by metes and bounds description, or by reference to area to be determined by survey, or by a grant in terms of a physical substance only, the more easily the space affected can be identified the stronger the inference that an estate or a right of exclusive occupation was intended to be conveyed. Conversely, the less easily it can be identified the stronger the inference that an interest other than an estate was intended to be conveyed.

Id. (emphasis added).

As explained above (p. 15), the rights of way at issue here are unlike rights of way commonly conveyed between private parties, because the railroad permanently occupied the space conveyed. Consistent with that broad use, each deed identifies

the precise boundaries of each strip of land conveyed, leaving no question as to the space that the railroad would occupy. As noted above, the railroad had surveyed and located the railway prior to executing the deeds, a fact that allowed the parties to identify the land conveyed exactly. Each deed specifies the width of the strip from the railway's center line, and each identifies the property through which the strip runs. This alone is sufficient to identify the boundaries of the land conveyed, although some of the deeds go further. The Wheeler Lumber 16/5, DuBois, and Thayer deeds also use degrees, and the Cummings deed additionally specifies that it transfers "7.70 acres more or less." Appx4773; Appx1281; Appx1478; Appx1263. Plaintiffs' arguments that these descriptions are not precise are without merit.

As to the Smith, Wheeler Lumber 16/5, Watt 12/343, and Woodbury 23/399 deeds, Plaintiffs appear to argue that identifying the property by reference to the railway's center line was insufficient and that the deeds needed also to describe the property in different or additional ways. Abrahamson Brief at 31. As noted above, the Wheeler Lumber 16/5 deed does so, but this was not necessary because the railroad corridor had been surveyed and located. Moreover, the notion that the parties were required to do it anyway is refuted by the above-quoted language from § 471 of the *Restatement*, which specifically identifies reference to a survey as one of the various ways that the boundaries of an estate may be identified. In contrast to the prospective survey mentioned in the *Restatement*, all of the deeds at issue here

refer to more concrete, *completed* surveys. The descriptions "distinguish [the conveyed] space from that possessed by the owners of estates in other lands," which is sufficient to identify a fee. *Restatement* § 471.

With respect to the DuBois, Rupp, and Thayer deeds, the Arent Fox Plaintiffs make no clear argument on this point, but they state in a footnote that a deed that relies on temporary survey stakes is of little use once the survey stakes are removed. Arent Fox Brief at 18. The Court should not consider this argument because arguments presented in footnotes are not preserved. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006). Nonetheless, this argument is both wrong for the reasons stated above and beside the point because none of these deeds relies on such stakes. The DuBois deed describes the property by reference to "the center line of grantee's railway as the same is last *located, staked out, surveyed and being constructed through* the described tract," Appx1281; the Rupp deed refers to the center line as it is "*surveyed, staked and located through*," Appx1446; and the Thayer deed refers to the same as it is "*surveyed and located through*," Appx1478. It is not plausible that the parties would fail to notice the railroad. Moreover, both the DuBois and Thayer deeds also describe the land by degrees. Appx1281; Appx1478.

The Bellisario Plaintiffs contend that the descriptions are imprecise because now that the tracks have been removed, there is no way to identify the boundaries of the conveyances. Bellisario Brief at 35. But even if their factual premise is correct, they cite nothing to support the notion that parties to a deed are required to anticipate such a change in circumstances and to address that possibility in the description of the property conveyed. If that were true, parties presumably could never use surveys in their descriptions of property, and the *Restatement* presumably would not specifically mention surveys as one of several means by which an estate can be identified in a deed. The notion that parties need to anticipate the possible removal of fixed structures is also refuted by *Bouche*, which found a description in terms of an existing railroad to be precise. 293 P.2d at 206, 209.

3. As used in the deeds, the phrase "strip of land" is not significant.

Plaintiffs also incorrectly suggest that the phrase "strip of land," which appears twice in the Wheeler and Westinghouse deeds and once in every other deed at issue on appeal, suggests an intent to limit the conveyances to easements. Abrahamson Brief at 27, Arent Fox Brief at 25-27, Bellisario Brief at 44-45. The Arent Fox Plaintiffs contend that the phrase is significant because, in general, a strip of land has little utility other than a means of access or right of way. *See* Arent Fox Brief at 15 (citing *Cappelli*, 496 P.2d at 212). This argument has several flaws.

First, assuming arguendo that *Bernards* ascribed some significance to the phrase, it does not appear to have any relevance after *Bouche*, in which the Oregon Supreme Court endorsed the general rule that conveyances to railroads which "purport to grant and convey a *strip*, piece, parcel, or tract of land"—and do not otherwise limit, directly or indirectly, the estate conveyed—"are usually construed as passing an estate in fee." 293 P.2d at 209 (emphasis added).

Second, even if the phrase still has some relevance, none of the deeds uses the phrase repeatedly, as did the deed construed in *Bernards*. That deed used the phrase at least five times, including in the granting clause, in the reversionary clause, and in the statement of warranties. 248 P.2d at 342. By contrast, the deeds at issue use the language exclusively in the description of the land, a portion of the deed that *Bernards* did not even set forth, let alone consider. Almost all of them use the phrase only once, but the two that use the phrase twice do so only to describe two different strips of land. *See* Appx4773-4774; Appx1510-1511.

Finally in this regard, both the Oregon Supreme Court and the Oregon Court of Appeals have recognized that rights of way obtained by public entities are generally more exclusive than those transferred in conveyances between private parties, which renders the general notion about rights of way inapposite and weighs in favor of finding a fee. *See Cappelli*, 496 P.2d at 213; *Realvest Corp.*, 100 P.3d at 1113. As the Oregon Court of Appeals explained:

> The nature of an easement is that the fee interest in the land over which the easement runs remains with the owner of the land, thus enabling both the holder of the easement and the fee owner to use the land consistently with the enjoyment of the easement. Thus, the grant of a "right of way" across private property from one private property owner to another suggests the grant of an easement. In contrast, the conveyance of privately-owned property to a public body for a public "right of way" is inconsistent with the understanding that the grantor retains some privately held right to use the conveyed property after the conveyance occurs. In general, the use left to such a grantor is to use the conveyed property as a member of the public.

Realvest Corp., 100 P.3d at 1113.

For the foregoing reasons, the phrase "strip of land" does not weigh in favor of an easement in any of the deeds.

4. The recitation of nominal consideration in some of the deeds is not alone sufficient to manifest the requisite intent to limit the interests conveyed to easements.

At bottom, the only feature that any of the deeds at issue have in common with the *Bernards* deed is the recitation of nominal consideration. The CFC found that 17 of the deeds at issue on appeal recite such consideration; of these deeds, 16 state a consideration of one dollar, and one states a consideration of two dollars.[12] The

[12] The 16 deeds that state a consideration of $1 are the Wheeler Lumber 16/5 deed, Appx4773; the Watt 12/343 deed, Appx4812, Appx1500; the Rinck deed, Appx1438; the Gattrell deed, Appx1302; the Westinghouse deed, Appx1510; the Jeffries deed, Appx1357; the Hagen deed, Appx1312; the Galvani deed, Appx1300; the Beals deed, Appx1219; the Burgholzer deed, Appx1238; the DuBois deed, Appx1281; the Thayer deed, Appx1478; the Watt 12/344 deed, Appx1502; the Watt 12/345 deed, Appx1504; the Wheeler Lumber 16/3 deed, Appx2133; and the Wilson deed, Appx1524. The Woodbury 23/99 deed states a consideration of $2. Appx4829; Appx1528.

remaining nine deeds state considerations ranging from $10 to $350, all of which the CFC found to be substantial. *See supra* p. 37 n.7. Before addressing Plaintiffs' arguments regarding the CFC's findings, it is important to explain that the recitation of nominal consideration is of little probative value in ascertaining the parties' intent and is not alone sufficient to demonstrate an intent to convey only an easement.

First and as the Abrahamson Plaintiffs acknowledge, the recitation of nominal consideration may reflect that no real consideration passed between the parties *or* that "*the real consideration* [*was*] *concealed*." Abrahamson Brief at 34 (emphasis added) (quoting *Black's Law Dictionary* 307(6th ed. 1990)). For this reason, *Realvest Corp.* afforded no weight to the fact that a deed recited a consideration of one dollar, because there was "no evidence that one dollar was the true consideration." 100 P.3d at 1113. It was not until 1967, well after the deeds at issue were executed, that the Oregon legislature enacted ORS § 93.030, which requires that conveyances state the actual consideration paid. *Id*. at 1113 n.6.

Second and related, it is clear that *Bouche* attached some significance to the fact that the deed stated substantial consideration, because aside from the incidental use of "right of way," the court explained that the deed "in every other particular" stated the conveyance of the fee. 293 P.2d at 209. But the converse is not true in *Bernards*. While the court there mentioned that "the consideration was only $1," it relied primarily on the fact that the granting clause conveyed a right to use the land

for railroad purposes as opposed to the land itself in its analysis. *See* 248 P.2d at 343-44. It is not clear what weight the court afforded to the recitation of nominal consideration and other characteristics that it set forth.

Third, we have found no Oregon case, and Plaintiffs have cited none, in which a court relied on the recitation of nominal consideration alone in finding that the requisite intent to limit a conveyance to an easement was manifested.

Therefore, it is unnecessary to determine whether the CFC erred in characterizing the considerations recited in some of the deeds as substantial because it does not change the outcome of these appeals. The distinction does not change the ultimate fact that, like the *Bouche* deed, the deeds at issue here contain "nothing therein which in anywise limits the company in the use it might make of the land" and otherwise state the conveyance of the fee. 293 P.2d at 209.

But in any event, the Plaintiffs' arguments that the CFC erred in characterizing the consideration stated in some of the deeds are unavailing. In particular, they contest the CFC's determinations that the $10 considerations stated in the Woodbury 16/481, Rupp, and Slattery deeds and the $150 consideration stated in the Smith 16/5 deed were substantial. Abrahamson Brief at 32-34; Arent Fox Brief at 23; Bellisario Brief at 37.[13] With respect to the Slattery deed, the Arent Fox Plaintiffs contend that

[13] This Court need not consider the Woodbury and Rupp deeds because Plaintiffs have presented no argument as to these deeds, such that any argument as to them is forfeited. *See* Abrahamson Brief at 32-34 (raising argument as to the Smith deed),

the CFC's decision that $10 is substantial consideration in inconsistent with its conclusion that the same amount was nominal consideration in *Boyer v. United States*, 123 Fed. Cl. 430, 438 (2015). *See* Arent Fox Brief at 23. This argument is unavailing for two reasons.

First, it is not clear that the consideration provision in the Slattery deed is identical to the deeds construed in *Boyer*, as the language of the deed is not set forth in that opinion. For its part, the Slattery deed does not state that the consideration was only $10, but instead "Ten Dollars to them in hand paid, the receipt whereof is hereby acknowledged, *and other valuable considerations moving to them*." Appx1462 (emphasis added). The Rupp deed contains identical language, and the Woodbury 16/481 contains the substantially similar phrase "and of other valuable considerations." Appx1446; Appx4864; Appx1526.[14] Similar language may not have been present in the *Boyer* deeds.

Arent Fox Brief at 23 (raising argument as to the Slattery deed); Albright Brief at 37 (stating, without any accompanying argument, that $10 is nominal consideration); *see also SmithKline Beecham Corp.*, 439 F.3d at 1319 (arguments not raised in the opening brief are forfeited).

[14] The Stowell, Rinck, and Hagen deeds contain similar language. *See* Appx1473 (Stowell: "for and in consideration of the sum of $50.00 and other good and valuable consideration to them in hand paid"); Appx1438 (Rinck: "for and in consideration of the sum of One Dollar to him in hand paid, the receipt whereof is hereby acknowledged, and other valuable considerations moving to him"); Appx1312 (Hagen: "for and in consideration of the sum of One Dollar ($1) and other good and valuable considerations").

Second, *Boyer* is binding neither on the CFC nor on this Court. The fact that the CFC reached one conclusion in a different case involving a different rail line and different deeds plainly does not establish that it made an error of law in assessing the deeds here.

With respect to the Smith deed, the Abrahamson Plaintiffs acknowledge that that $150 would not instinctively be regarded as nominal, but they argue that it should be deemed so here because there is a significant discrepancy between $150 and the value of the land. Abrahamson Brief at 31-33. But they have not established either that $150 was the actual amount paid or the value of the land at the time of the conveyance. It was Plaintiffs' burden to do so. *See Keystone*, 480 at 493.

Accordingly, the fact that some of the deeds recite nominal consideration does not establish the requisite intent to limit the conveyances to easements.

B. *Boyer* casts no doubt on the CFC's decision and is not binding in any event.

The Bellisario Plaintiffs contend that the CFC's treatment of "strip of land" and "through," and its conclusion that all of the deeds describe the land conveyed with some degree of specificity, are inconsistent with *Boyer*. According to Plaintiffs, this inconsistency violates *Leo Sheep Co. v United States*, 440 U.S. 668, 687-88 (1979), which purportedly held that there is a "special need for certainty and predictability" where property rights are concerned. Bellisario Brief at 43-47. There are multiple flaws in this argument.

First, the Supreme Court's general admonition in *Leo Sheep* has no relevance here, and it presents no conflict with the CFC's fact-bound decisions as to the scope of the deeds under Oregon law presented in these appeals. Indeed, contrary to the Bellisario Plaintiffs' contention, the CFC's decision in these cases promotes certainty and predictability in the field of property law because it adheres to the Oregon Supreme Court's guidance in *Bouche* and *Bernards*.

Moreover, the fact that the CFC may have found certain terms or phrases to be more significant in the context of different deeds for a different rail line does not demonstrate that it erred here in interpreting the deeds before it. Indeed, for all of the reasons explained above, the court did not err. Plaintiffs' arguments that isolated uses of "strip of land" and "through" are suggestive of an easement finds no support in *Bernards* or in Oregon law more broadly, and they were correctly rejected by the CFC. Plaintiffs' argument that the deeds do not describe the land conveyed with precision is refuted by the deeds themselves. The different deeds construed in *Boyer* may have been less precise in this respect. Similarly and as discussed above, the *Boyer* deeds that stated a consideration of $10 may not have referred to additional consideration, as the deeds in these appeals that state the same amount do refer.

Second, to the extent that the CFC's analysis in these cases reflects a more considered and complete analysis than its analysis in *Boyer*, that fact is not grounds for reversal. As noted above, *Boyer* is binding neither on the CFC nor on this Court.

For the foregoing reasons, *Boyer* does not establish that any of the deeds conveyed easements.

C. The railroad did not exceed its authority under its own charter or under Oregon statutes governing the powers of corporations; even if it did, Plaintiffs may not object to the conveyances on this basis.

Finally, the Bellisario Plaintiffs grasp at straws in their assertion that the railroad's own charter, along with Oregon statutes governing the power of corporations, prohibited the railroad from acquiring its rights of way in fee simple. Bellisario Brief at 26-28. Plaintiffs are wrong, and even if the railroad exceeded its authority, Plaintiffs may not object to the conveyances on this basis.

First of all, there is no logical reason that the railroad would have prohibited itself from acquiring its rights of way in fee simple and it did not do so. Its charter broadly authorizes it to acquire "the necessary rights of way and other property" for the railroad, and the charter states no limitations on the type of interest that the railroad could acquire. Appx1839.

Plaintiffs' argument that the railroad's charter vested it only with the powers granted to it under Oregon statutes, and that the statutes prohibited railroads from acquiring their rights of way in fee simple, fares no better. Plaintiffs rely on Section 5056 of *Bellinger and Cotton's Codes and Statutes of Oregon* (1902), which broadly authorized corporations to "purchase, possess, and dispose of such real property as may be necessary and convenient to carry into effect the objects of the

incorporation," Appx1857-1858; on Section 5075, which states geographic limitations on corporations' power to appropriate land, Appx1867-1868; and on Section 5095, which provides that in the absence of an agreement with a landowner, corporations could maintain a condemnation action for the purpose of "having such lands . . . or other right or easement appropriated to its use," Appx1873. Plainly, none of these provisions prohibited corporations from acquiring fee simple estates by deed. Again, the Plaintiffs' assertion that the railroad lacked the authority to acquire fee estates is strongly undermined by their own stipulations that the railroad in fact did so along this rail line in different deeds.

Further, even if the railroad exceeded its authority, that fact would not permit this Court to reform the deeds at the Plaintiffs' behest, and it would be improper for the Court to skew its analysis based on a belief that the railroad had done so. The Supreme Court of Vermont correctly recognized that plaintiffs lacked standing to assert a challenge to railroad deeds on this basis, because settled law establishes that a conveyance to or by a corporation that lacks the power to hold or transfer the property nonetheless transfers title. *Old Railroad Bed*, 95 A.3d at 406. This rule also promotes "stability and settled expectations in real property transactions and title ownership," *id.* at 407-08, and accordingly such ultra vires deeds "are traditionally said not to be void, but voidable, and then only by the state," *id*. at 406;

see also Kerfoot v. Farmers' and Merchants' Bank, 218 U.S. 281, 286 (1910). As explained in an early Oregon decision:

> An application to set aside a voidable deed, is addressed to the equity side of the court. And a grantor who seeks to show that his own deed is voidable, has no standing in a court of equity while he retains the purchase price. If a corporation has usurped privileges . . . or franchises not belonging to it, to the detriment of the public, the remedy is by an action, in the name of the State.

Kelly v. People's Transportation Co., 3 Or. 189 (Or. Cir. Ct. 1870).

Therefore, the Bellisario Plaintiffs' argument based on the railroad's charter and Oregon statutes governing the powers of corporations misses the mark entirely.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Federal Claims should be affirmed.

Respectfully submitted,

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ADDENDUM TABLE OF CONTENTS

West's Oregon Revised Statutes Annotated Title 10. Property Rights and Transactions Chapter 93. Conveyancing and Recording Special Matters in Particular Conveyances

O.R.S. § 93.120

93.120. Words of inheritance not necessary to create or convey estate in fee simple; conveyance passes all the estate

Currentness

The term "heirs," or other words of inheritance, is not necessary to create or convey an estate in fee simple. Any conveyance of real estate passes all the estate of the grantor, unless the intent to pass a lesser estate appears by express terms, or is necessarily implied in the terms of the grant.

O. R. S. § 93.120, OR ST § 93.120
Current through laws enacted in the 2018 Regular Session and 2018 Special Session of the 79th Legislative Assembly; ballot measures approved and rejected at the Nov. 6, 2018 general election; and emergency legislation, 91-day legislation, and general effective legislation effective Jan. 1, 2020, enacted during the 2019 Regular Session of the of the 80th Legislative Assembly, which adjourned sine die June 30, 2019, pending classification of undesignated material and text revision by the Oregon Reviser. See ORS 173.160. Non-legislative changes made by the Legislative Counsel Committee, consisting of codifications, renumbers, and other non-legislative revisions, have been incorporated.

End of Document

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HON. CHARLES B. BELLINGER
U. S. DISTRICT JUDGE, DIST. OF OREGON

AND

WILLIAM W. COTTON
OF THE PORTLAND BAR

IN TWO VOLUMES

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upon her covenant entered into during coverture to convey her separate real estate at a future time: Frarey v. Wheeler, 4 Or. 190.

A clause in a deed purporting to be the sole deed of the husband that the wife releases and quitclaims all her dower interest does not operate to convey an existing or after-acquired estate in fee simple: Burston v. Jackson, 9 Or. 275.

Where a married woman owns land in this state in her own right, and she and her husband resided out of the state, she may, by joining in a power of attorney with her husband, empower another to convey such property: Moreland v. Brady, 8 Or. 316, 34 Am. Rep. 581.

§ 5335. Deed of Quitclaim Sufficient to Pass Estate.

A deed of quitclaim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale. [L. 1854, D. Cd. p. 647, § 3; H. C. § 3004.]

A deed of quitclaim simply passes such an estate as the grantor has a legal right to convey by deed of bargain and sale. Where A, B, and C jointly occupy a tract of land, claiming to be the proprietors thereof, the title to which is in the United States, join in a deed, by which they release, confirm, and quitclaim to one of their number, B, a designated part thereof, and such deed contains covenants to warrant and defend against all persons, except the United States, and for further assurance was so attested as to entitle it to record, and where A afterward obtained a patent for such tract, it was held that the title so acquired inured to the benefit of B, and that by a deed of quitclaim from A to D, D took subject to B's prior equities in the land: Baker v. Woodward, 12 Or. 10, 6 Pac. 173.

In spite of this section a material difference is still recognized between deeds of quitclaim and those of bargain and sale. The grantor in the former only intends ordinarily to convey such right to or interest in the property as he may have, and the grantee does not expect to acquire anything beyond that, while in the latter the parties usually intend and expect the transfer of the property itself: American Mortg. Co. v. Hutchinson, 19 Or. 343, 24 Pac. 515.

In Taggart v. Risley, 4 Or. 235, the court holds that after-acquired title passes by a deed which clearly shows that the grantor intended to pass an absolute title, and not merely the title which he had at the time of conveyance, and this, though the deed contained no express covenant of warranty; but, Thayer, J., dissenting, held that no future-acquired title will pass unless by express warranty, for, he says, that by the statutes, § 5338, all implied covenants are abolished; and he says further that the office of conveyances under this section is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenants. Of course, by express covenants of warranty any after-acquired title will pass: Taggart v. Risley, 4 Or. 235; Dolph v. Barney, 5 Or. 192.

A deed of bargain and sale is inoperative as such unless the consideration be expressed therein, or proved, but it may operate as a grant if that word be used: Lambert v. Smith, 9 Or. 185.

A quitclaim deed or a release in Oregon passes all the interest which the grantor could lawfully convey by deed of bargain and sale: Taggart v. Risley, 4 Or. 235; Dolph v. Barney, 5 Or. 192.

The agreeing to make or the making of a quitclaim deed does not prevent or estop the maker from purchasing subsequently an outstanding title to and holding the same property: Shively v. Welch, 2 Or. 288.

After-acquired title does not pass by a conveyance of property acquired under the Oregon donation act: Myers v. Read, 9 Saw. 17.

§ 5336. The Word "Heirs" Not Necessary to Convey an Estate in Fee Simple.

The term "heirs," or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant. [L. 1854, D. Cd. p. 647, § 4; H. C. § 3005.]

Estates in fee tail have been impliedly abolished in this state: Rowland v. Warren, 10 Or. 130.

A covenant in a deed to a railroad company, by which the grantor agrees to build a fence along the railroad, "or not hold such railroad responsible for any damage done to stock belonging to us," without any mention of assigns, is personal to the grantors, binding them only, and does not run with the land or affect the tenants or successors in interest: Brown v. Southern Pac. Co. 36 Or. 133, 58 Pac. 1104, 78 Am. St. Rep. 761, 47 L. R. A. 409.

§ 5337. Conveyance by Tenant of Greater Estate Than he Possesses, Effect Of.

A conveyance made by a tenant for life or years, purporting to grant a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which

LORD'S OREGON LAWS

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BY

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Code Commissioner

AND

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Of the Portland Bar

In Three Volumes

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said John Spence, his heirs and assigns, all my right, claim, or possibility of dower in or out of the aforedescribed premises," does not operate as a conveyance of an existing or after acquired estate in fee simple in the land, by estoppel or otherwise: *Burston* v. *Jackson*, 9 Or. 275.

§ 7102. Deed of Quit Claim Sufficient to Pass Estate.

A deed of quit claim and release, of the form in common use, shall be sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale. [L. 1854; D. p. 647, § 3; H. § 3004; B. & C. § 5335.]

Where A, B, and C jointly occupy a tract of land, claiming to be the proprietors thereof, the title to which is in the United States, join in a deed, by which they release, confirm, and quit-claim to one of their number, B, a designated part thereof, and such deed contains covenants to warrant and defend against all persons, except the United States, and for further assurance, but was not so attested as to entitle it to record, and afterward A obtained a patent for said tract; it was held that B or his grantees thereby became the equitable owners of such land, against all persons having knowledge or notice of their rights. A, after obtaining the patent, conveyed and quit-claimed to D "all his right, title, and interest" in said tract. Such deed passed only such an estate as the grantor had a legal right to convey by deed of bargain and sale, and D took subject to B's prior equities in the land: *Baker* v. *Woodward*, 12 Or. 1, 6 Pac. 173.

The office of a quit-claim deed is well understood, and although it is as effective, under modern legislation, to convey all the estate which can be transferred by a deed of bargain and sale, yet it shows upon its face that the grantee therein only contracts for such title to the property as the grantor has. Such deed is sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale; but a material difference is still recognized between the two forms of conveyance. A grantor, under the former conveyance, only intends ordinarily to convey such right to, or interest in, the property as he may have, and the grantee does not expect to acquire anything beyond that; while under the latter, the parties usually intend and expect a transfer of the property itself: *American Mortg. Co.* v. *Hutchinson*, 19 Or. 343, 24 Pac. 515.

If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty: *Taggart* v. *Risley*, 4 Or. 235.

Where a grantor covenants to warrant the premises against all persons claiming by, through, or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee: *Taggart* v. *Risley, supra;* Thayer, J., dissenting.

The office of our modern conveyances is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenant. The words "grant, bargain, and sell" in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed: *Taggart* v. *Risley, supra; Dolph* v. *Barney*, 5 Or. 192.

A deed of bargain and sale is inoperative as such unless the consideration be expressed therein, or proved, but it may operate as a grant if that word be used: *Lambert* v. *Smith*, 9 Or. 185.

A quit-claim deed or a release in Oregon passes all the interest which the grantor could lawfully convey by deed of bargain and sale: *Taggart* v. *Risley*, 4 Or. 235; *Dolph* v. *Barney*, 5 Or. 192.

The agreeing to make or the making of a quit-claim deed does not prevent or estop the maker from purchasing subsequently an outstanding title to and holding the same property: *Shively* v. *Welch*, 2 Or. 288.

After-acquired title does not pass by a conveyance of property acquired under the Oregon donation act: *Myers* v. *Read*, 9 Saw. 17.

A deed of bargain and sale with covenants against the acts of the grantor passes every interest and estate which the grantor then has or may subsequently acquire, and the fact that it contains a limited warranty, or is entirely without warranty, does not of itself impute notice of latent or prior equities: *Raymond* v. *Flavel*, 27 Or. 219, 40 Pac. 158.

§ 7103. The Word "Heirs" Not Necessary to Convey an Estate in Fee Simple.

The term "heirs," or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant. [L. 1854; D. p. 647, § 4; H. § 3005; B. & C. § 5336.]

A covenant in a deed to a railroad company, by which the grantor agrees to build a fence along the railroad, "or not hold such railroad responsible for any damage done to stock belonging to us," without any mention of assigns, is personal to the grantors, binding them only, and does not run with the land or affect the tenants or successors in interest: *Brown* v. *Southern Pac. Co.* 36 Or. 133, 58 Pac. 1104, 78 Am. St. Rep. 761.

H., a testator, devised a tract of land to his daughter, M. E., and her body heirs, but ordered that if she died without leaving children, the land should revert to his other heirs. M. E.'s title to the land passed to a stranger in the life time of M. E., by purchase at a sheriff's sale. M. E. died leaving children; and it was held that estates in fee tail have been impliedly abolished in this state. M. E. took either a fee simple or a fee simple conditional, defeasible on the contingency of her dying without children, with

a limitation over by executory devise. *Held*, that the sheriff's deed passed a fee simple: *Rowland* v. *Warren*, 10 Or. 129.

If a half interest in a partnership fence is transferred to one of adjoining land owners, but the other adjoining land owner and the grantor stipulated for himself, his heirs and assigns, to make the necessary repairs, such covenant would probably run with the land, and could be enforced by the party entitled to the performance: *Ready* v. *Schmith*, 52 Or. 201, 95 Pac. 817.

§ 7104. Conveyance by Tenant of Greater Estate Than He Possesses, Effect of.

A conveyance made by a tenant for life or years, purporting to grant a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such tenant could lawfully convey. [L. 1854; D. p. 647, § 5; H. § 3006; B. & C. § 5337.]

§ 7105. No Covenants Are Implied in a Conveyance.

No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. [L. 1854; D. p. 647, § 6; H. § 3007; B. & C. § 5338.]

This section abolishes all implied covenants in deeds: *Taggart* v. *Risley*, 4 Or. 235.

A lease not being a conveyance within the meaning of this section, there is a covenant implied that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease: *Edwards* v. *Perkins*, 7 Or. 149.

No covenant or assurance of title or right to convey real estate can be implied from the operative words of an instrument reciting that the seller grants, bargains, sells, and conveys "the following personal property," including a lumber flume; only personal property being included in the instrument: *Falls City Lumber Co.* v. *Watkins*, 53 Or. 212, 99 Pac. 884.

In order to create an easement that shall be appurtenant to an estate and run with the land, it is necessary that as a part of the transaction the grantor either part with or receive some title to or interest in the land impressed, or create some right for the benefit thereof, otherwise the agreement will be but a personal promise: *Houston* v. *Zahm*, 44 Or. 621, 76 Pac. 641.

An agreement between an owner wishing to sell a tract of land and a prospective buyer that the latter, if allowed to buy, will open and maintain a public highway through it, between certain points, although the option was exercised and the agreement recorded, does not create an easement or a right to have the way opened, as against a subsequent purchaser from such buyer. The agreement is merely a personal covenant, collateral to the land, and not assignable: *Houston* v. *Zahm*, *supra*.

§ 7106. Covenant to Pay Money Not Implied in Mortgage.

No mortgage shall be construed as implying a covenant for the payment of the sum thereby intended to be secured; and when there shall be no express covenant for such payment contained in the mortgage, and no bond or other separate instrument to secure such payment shall have been given, the remedies of the mortgagee shall be confined to the lands mentioned in the mortgage. [L. 1854; D. p. 647, § 7; H. § 3008; B. & C. § 5339.]

In view of this section, providing that no mortgage shall be construed as implying a covenant to pass the sum secured, and in the absence of such a covenant or other instrument to secure such payment, the remedy of the mortgagee shall be confined to the lands mentioned in the mortgage, the decree foreclosing a deed given as a mortgage should direct only a sale of the property and an application of the money received to the payment of the costs and disbursements and the debt, without any personal or deficiency judgment: *Kramer* v. *Wilson*, 49 Or. 342, 90 Pac. 183.

Where a mortgage was given to secure the payment of notes, which constituted a part of the mortgage, such notes containing an express agreement to pay the sum specified therein, a deficiency judgment was authorized on foreclosure: *Stewart* v. *Templeton*, ... Or....., 106 Pac. 640.

The correct interpretation of this section is that when there is a covenant for the payment of a certain sum in the mortgage the remedy shall be against the land, and at the same time a personal judgment may be obtained to collect any amount which may remain unpaid after the proceeds of the sale of the mortgaged premises have been applied to the extinguishment of the judgment; and when there is no covenant for the payment of a certain sum in the mortgage the remedy is against the mortgaged premises only, and there can be no personal judgment for any deficit. The absence of a covenant does not destroy the vital force of the mortgage, but only limits the operation of any decree upon it to the described premises: *Myer* v. *Beal*, 5 Or. 130.

See § 426, relating to deficiencies on purchase mortgages.

OREGON LAWS

SHOWING

ALL THE LAWS OF A GENERAL NATURE IN FORCE IN THE STATE OF OREGON

INCLUDING THE

SPECIAL SESSION OF 1920

COMPILED AND ANNOTATED

BY

HON. CONRAD PATRICK OLSON
CODE COMMISSIONER
FORMERLY ASSOCIATE JUSTICE OF SUPREME COURT OF OREGON

IN TWO VOLUMES

VOLUME II

PUBLISHED BY AUTHORITY OF AN ACT APPROVED MARCH 1, 1919

SAN FRANCISCO
THE BANCROFT-WHITNEY COMPANY
1920

SAN FRANCISCO
THE FILMER BROTHERS ELECTROTYPE COMPANY
TYPOGRAPHERS AND STEREOTYPERS

under modern legislation, to convey all the estate which can be transferred by a deed of bargain and sale, yet it shows upon its face that the grantee therein only contracts for such title to the property as the grantor has. Such deed is sufficient to pass all the estate which the grantor could lawfully convey by a deed of bargain and sale; but a material difference is still recognized between the two forms of conveyance. A grantor, under the former conveyance, only intends ordinarily to convey such right to, or interest in, the property as he may have, and the grantee does not expect to acquire anything beyond that; while under the latter, the parties usually intend and expect a transfer of the property itself: American Mort. Co. v. Hutchinson, 19 Or. 343, 24 Pac. 515.

If the terms of a deed clearly show that it was meant to pass an absolute estate to the land itself, and not merely the estate which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequently to its execution, and this though it contain no warranty: Taggart v. Risley, 4 Or. 235.

Where a grantor covenants to warrant the premises against all persons claiming by, through, or under himself, and he subsequently acquires the legal title to the premises, that legal title will inure to the benefit of the grantee: Taggart v. Risley, supra; Thayer, J., dissenting.

The office of our modern conveyances is simply to convey the estate which the grantor has. It is the policy of the law to bind a party to a deed only by express stipulation covenant. The words "grant, bargain, and sell" in a conveyance do not imply that the grantor is the absolute owner of the premises conveyed: Taggart v. Risley, supra; Dolph v. Barney, 5 Or. 192.

A deed of bargain and sale is inoperative as such unless the consideration be expressed therein, or proved, but it may operate as a grant if that word be used: Lambert v. Smith, 9 Or. 185.

A quitclaim deed or a release in Oregon passes all the interest which the grantor could lawfully convey by deed of bargain and sale: Taggart v. Risley, 4 Or. 235; Dolph v. Barney, 5 Or. 192.

The agreeing to make or the making of a quitclaim deed does not prevent or estop the maker from purchasing subsequently an outstanding title to and holding the same property: Shively v. Welch, 2 Or. 288.

After-acquired title does not pass by a conveyance of property acquired under the Oregon donation act: Myers v. Reed, 17 Fed. 401, 9 Sawy. 132,

A deed of bargain and sale with covenants against the acts of the grantor passes every interest and estate which the grantor then has or may subsequently acquire, and the fact that it contains a limited warranty, or is entirely without notice of latent or prior equities: Raymond v. Flavel, 27 Or. 219, 40 Pac. 158.

This section, providing that a deed of real estate shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied, where plaintiff deeded land to a county, the deed reciting "that this conveyance is made and accepted on condition that certain described real estate is to be used for a site for a high school, and for no other purpose, and, if not so used for such purpose, title shall revert to the grantors," the conveyance was of a fee-simple estate, subject to defeasance by the happening of a condition subsequent, and not a conveyance of a base or determinable fee: Wagner v. Wallowa County, 76 Or. 464, L. R. A. 1916F, 303, 148 Pac. 1140.

§ 9847. The Word "Heirs" not Necessary to Convey an Estate in Fee Simple. The term "heirs," or other words of inheritance, shall not be necessary to create or convey an estate in fee simple; and any conveyance of any real estate hereafter executed shall pass all the estate of the grantor, unless the intent to pass a less estate shall appear by express terms, or be necessarily implied in the terms of the grant. [L. 1854; D. p. 647, § 4; H. § 3005; B. & C. § 5336; L. O. L. § 7103.]

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owners, but the other adjoining land owner and the grantor stipulated for himself, his heirs and assigns, to make the necessary repairs, such covenant would probably run with the land, and could be enforced by the party entitled to the performance: Ready v. Schmith, 52 Or. 201, 95 Pac. 817.

The word "heirs" is not necessary in a deed to convey a fee-simple estate: Ford v. Oregon Electric Ry. Co., 60 Or. 284, Ann. Cas. 1914A, 280, 36 L. R. A. (N. S.) 358, 117 Pac. 809; Irvine v. Irvine, 69 Or. 189, 136 Pac. 18; Ruhnke v. Aubert, 58 Or. 11, 113 Pac. 38; Tone v. Tillamook City, 58 Or. 385, 114 Pac. 938.

A deed to one in trust to sell the land conveyed an estate in fee: Robison v. Hicks, 76 Or. 24, 146 Pac. 1099.

Deed, granting to trustees possession of the premises and imposing upon them the performance of active duties relating to the control and management of the estate, contemplated that legal title should vest in trustees until the contingency terminating the trust arrived: Crown Co. v. Cohn et al., 88 Or. 642, 172 Or. 804.

A conveyance is deemed to be of a fee-simple estate, unless a contrary intent appears in express terms, or is necessarily implied by the grant: Ruhnke v. Aubert, 58 Or. 11, 113 Pac. 38; Irvine v. Irvine, 69 Or. 189, 136 Pac. 18; Love v. Walker, 59 Or. 105, 115 Pac. 296; Tone v. Tillamook City, 58 Or. 385, 114 Pac. 938.

Where plaintiff deeded land to a county, the deed reciting "that this conveyance is made and accepted on condition that certain described real estate is to be used for a site for a high school, and for no other purpose, and, if not so used for such purpose, title shall revert to the grantors," the conveyance was of a fee-simple estate, subject to defeasance by the happening of a condition subsequent, and not a conveyance of a base or determinable fee: Wagner v. Wallowa County, 76 Or. 464, L. R. A. 1916F, 303, 148 Pac. 1140.

§ 9848. Conveyance by Tenant of Greater Estate Than He Possesses, Effect of. A conveyance made by a tenant for life or years, purporting to grant a greater estate than he possessed or could lawfully convey, shall not work a forfeiture of his estate, but shall pass to the grantee all the estate which such tenant could lawfully convey. [L. 1854; D. p. 647, § 5; H. § 3006; B. & C. § 5337; L. O. L. § 7104.]

§ 9849. No Covenants are Implied in a Conveyance. No covenant shall be implied in any conveyance of real estate, whether such conveyance contain special covenants or not. [L. 1854; D. p. 647, § 6; H. § 3007; B. & C. § 5338; L. O. L. § 7105.]

This section abolishes all implied covenants in deeds: Taggart v. Risley, 4 Or. 235.

A lease not being a conveyance within the meaning of this section, there is a covenant implied that the lessor will protect the lessee in the quiet enjoyment of the premises for the term of the lease: Edwards v. Perkins, 7 Or. 149.

No covenant or assurance of title or right to convey real estate can be implied from the operative words of an instrument reciting that the seller grants, bargains, sells and conveys "the following personal property," including a lumber flume; only personal property being included in the instrument: Falls City Lumber Co. v. Watkins, 53 Or. 212, 99 Pac. 884.

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An agreement between an owner wishing to sell a tract of land and a prospective buyer, that the latter, if allowed to buy, will open and maintain a public highway through it, between certain points, although the option was exercised and the agreement recorded, does not create an easement or a right to have the way opened, as against a subsequent purchaser from such buyer. The agreement is merely a personal covenant, collateral to the land, and not assignable: Houston v. Zahm, supra.

The implied covenant of quiet enjoyment arising in case of a lease is not in violation of section 9849, declaring that no covenant shall be implied in any conveyance of real estate, for a lease of land is not a conveyance: Northern Brewery Co. v. Princess Hotel, 78 Or. 462, Ann. Cas. 1917C, 621, 153 Pac. 37.

A parol dedication of streets to the public is not a grant, and a sale and conveyance of lots in a town site with reference to an existing plat of the premises, indicating dedicated streets as a boundary, implies a covenant that the streets and other places designated shall never be appropriated by the owner to a use inconsistent with that represented by the map, upon the faith which the lots are sold, where no express grant of the streets has been made to the public: Mutual Irr. Co. v. Baker City, 58 Or. 306, 110 Pac. 392, 113 Pac. 9.

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020, I electronically filed the foregoing brief with the United States Court of Appeals for Federal Circuit by using the appellate CM/ECF system.

All case participants are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Anna T. Katselas
Anna T. Katselas

FORM 19. Certificate of Compliance With Rule 32(a)

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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