NOT DESIGNATED FOR PUBLICATION

No. 113,104

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SHARRON JENKINS,
Appellant,

v.

CHICAGO PACIFIC CORPORATION, *et al*.,
Appellees.

MEMORANDUM OPINION

Appeal from Jackson District Court; MICHEAL A. IRELAND, judge. Opinion filed February 5, 2016. Affirmed.

Nicholas David, of The David Law Office LLC, of Topeka, for appellant.

Danielle N. Davey, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Topeka, for appellee Eben Crosby.

Alexandria S. Morrissey, of Holton, for appellee Jackson County.

J. Richard Lake, of Holton, for appellee Willis McGee.

Before MALONE, C.J., PIERRON, J., and WALKER, S.J.

Per Curiam: Sharron and Gerald Jenkins received, by quitclaim deed, property that had previously been used by the Chicago, Kansas and Nebraska Railway Company, the predecessor of Chicago Pacific Corporation, (Chicago Pacific) as a railroad track

running through the town of Holton. Use of the property as a railroad track has long since been abandoned. Gerald is now deceased and Sharron filed a quiet title action to a large number of property lots in Holton. The district court granted summary judgment in favor of the multiple defendants by finding that when the railroad had been abandoned, the property reverted to the original landholders. Sharron appeals.

The facts in this case are fairly straightforward and for the most part not disputed by the parties. Resolving the legal effect of the original conveyance of the property will be the ultimate determination in this case.

On September 3, 1886, Amos Finn, George and Martha Drake, and Ira and Elizabeth Tabor, conveyed the disputed property to Chicago Pacific's predecessor for $5,750. The deed described the property being conveyed as:

> "A strip of land, Three Hundred and Fifty (350) feet wide, of which the center line of the route and line of the Chicago Kansas and Nebraska Railway Company as the same is now surveyed staked and located is the center, being one hundred and seventy five feet each side of the center line of said route, over, across and through the following described tract of land, as said route and line of said Railway passes through the same, to wit: [description of the properties the route passes over]."

As best as we can decipher, the hand-written deed conveying the above property also used the following language:

> "And said parties of the first part [landowners] for themselves and their heirs, executors or administrators, do hereby covenant, promise and agree to and with said party of the second part [Chicago Pacific], *that at the delivery of this, presents they are lawfully seized in their own right of an absolute and indefeasible estate of inheritance in fee simple*, of and in all and singular the above granted and described premises with appurtenances, that the same are free and clear of any encumbrances done or suffered by them or those under whom they claim, and that they will warrant and forever defend the

> same with said party of the second part, it's successors and assigns against said parties of the first part, their heirs and all and every person or persons whomsoever, lawfully claiming or to claim the same." (Emphasis added.)

The next conveyance of the disputed property by Chicago Pacific occurred nearly 100 years later. On September 20, 1985, Chicago Pacific transferred the property by quitclaim deed to Dirt and Gravel, Inc., for the sum of $10 and other good and valuable consideration. The deed indicated that Dirt and Gravel acquired the right, title, and interest of Chicago Pacific wherever "evidenced, monumented or located in the County aforesaid, less and except any prior recorded conveyances." In discussing the reservation by Chicago Pacific of transportation and transmission of various types of energy on the property, the deed reserved this ability on "any portion of the premises lying within fifty (50) feet of the centerline of Grantor's former main railroad track(s)."

Over a decade later, on October 13, 1994, Dirt and Gravel executed a quitclaim deed to the Jenkins for the sum of $1 and other good and valuable consideration. The deed gave the Jenkins all the estate, title, and interest possessed by Dirt and Gravel. The legal description of the property was "[a]ll that portion of the abandoned Chicago, Rock Island and Pacific Railroad right of way" in various lots located in Holton.

It was not until August 15, 2010, when the issues in this case came to a head. On that date, Sharron filed a quiet title action seeking a determination that titles to 20 of the lots in question were legally vested in her as fee simple owner. Several defendants, including Eben Crosby, Twila Conger, Willis McGee, and Jackson County, claimed legal ownership of the disputed property and also claimed entitlement by adverse possession.

The district court decided the case based on several motions for summary judgment. The court held in favor of the defendants under the following reasoning:

> "It is the Court's thought process and decision that upon the railroad ceasing its operation these disputed lands reverted back to the original landholdings from which they came based upon case law as found in Defendant's briefs. Specifically this is the 350 foot wide track that was deeded in 1886 and is subject of this litigation.
>
> "It is the Court's decision when the railroad attempted to deed property to Dirt and Gravel the railroad deeded land it was not legally capable of deeding.
>
> "In making this decision and setting forth legal descriptions the Court goes to what was the calculated centerline of the vacated railroad line. Then land on each side of that vacated area is assigned to various landowners."

Sharron appeals.

Sharron argues Chicago Pacific exercised valid statutory authority to purchase and convey the land in question. She claims the 1886 deed gave Chicago Pacific fee simple ownership and did not limit the railroad's use to a railroad or even a right-of-way. Sharron contends the deed is unambiguous and cannot be attacked by parol evidence. Consequently, she argues she has a fee simple interest and this court should quiet title to the property in her favor.

The standards for granting summary judgment are well known. They are predicated upon a showing that there is no genuine issue as to any material fact and that based upon those undisputed facts the movant is entitled to judgment as a matter of law. K.S.A. 2014 Supp. 60-256(c). In considering a motion for summary judgment, the court must resolve all facts and inferences reasonably drawn from the evidence in favor of the party against whom summary judgment is sought. *Bergstrom v. Noah*, 266 Kan. 847, 871, 974 P.2d 531 (1999).

Equally important in this case are the standards of review for interpretation of legal documents. The interpretation and legal effect of written instruments are matters of law, and our standard of review is unlimited on a question of law. See *Kansas Gas &*

Electric Co. v. Will Investments, Inc., 261 Kan. 125, 128, 928 P.2d 73 (1996). "Regardless of the construction given a written contract by the trial court, an appellate court may construe a written contract and determine its legal effect." *Sunflower Park Apts. v. Johnson*, 23 Kan. App. 2d 862, 863-64, 937 P.2d 21 (1997). Moreover, "[t]he primary rule for interpreting written contracts is to ascertain the parties' intent. If the terms of the contract are clear, the intent of the parties is to be determined from the language of the contract without applying rules of construction." *Osterhaus v. Toth*, 291 Kan. 759, 768, 249 P.3d 888 (2011).

General Railroad Law

A railroad may acquire an interest in real property by eminent domain, by purchase, or by voluntary grant. See K.S.A. 66-501; *Schoenberger v. Missouri Pac. RR Co.*, 29 Kan. App. 2d 245, 246, 26 P.3d 700 (2000), *rev. denied* 270 Kan. 899 (2001); *Atchison, Topeka & Santa Fe Ry. Co. v. Humberg*, 9 Kan. App. 2d 205, 207, 675 P.2d 375 (1984). K.S.A. 66-501 provides, in relevant part, that every railway corporation has the power:

> "*Second*. To take and hold such voluntary grants of real estate and other property as shall be made to it to aid in the construction, maintenance and accommodation of its railway; but the real estate received by voluntary grant shall be held and used for the purpose of such grant only, and to purchase and hold, with power to convey, real estate, for the purpose of aiding in the construction, maintenance and accommodation of its railway.
>
> "*Third*. To lay out its road, not exceeding one hundred feet in width, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of the road; and also such land as may be deemed necessary for side tracks, depots, workshops and water stations . . . ."

Kansas courts have "uniformly held that railroads do not own fee titles to narrow strips taken as right-of-way, regardless of whether they are taken by condemnation or right-of-way deed." *Harvest Queen Mill & Elevator Co. v. Sanders*, 189 Kan. 536, 542, 370 P.2d 419 (1962). However, "[w]here a railroad owns the land under its tracks in fee simple, the abandonment of its rail service does not affect its property right at all." 65 Am. Jur. 2d, Railroads § 54. Multiple cases have discussed a railroad's interest in land.

Abercrombie v. Simmons, *71 Kan. 538, 81 P. 208 (1905)*

Abercrombie provides early Kansas railroad jurisprudence that is still cited with regularity today. A railroad company was about to begin construction of a railroad and purchased a strip of land 100 feet wide running through a quarter section of land from Simmons. The conveyance was made in a general warranty deed which described the property. Although the railroad recorded a map and profile of the track route on the land, the railroad track was never graded or constructed. Simmons and his successors continued to cultivate the land, but the railroad company paid the taxes on the strip of land for nearly 12 years until it conveyed the land to Abercrombie. Abercrombie asserted ownership of the land, arguing that the railroad acquired absolute title to the land and nothing less had been conveyed to him.

In considering if the railroad's interest was one that it could convey to Abercrombie, our Supreme Court first reviewed G.S. 1901, § 1316 (now K.S.A. 66-501), the statute establishing the limitations on holding voluntary grants, purchasing, and obtaining real estate by eminent domain:

> "The statutes recognize that land for a right of way may be acquired by purchase as well as by compulsory proceedings. When so purchased for that purpose does the railroad company hold a higher or better right than where it is acquired by virtue of eminent domain? May a railroad company purchase a strip of land extending a great

distance through the country and over many farms, abandon the enterprise, and then sell the strip to those who will put it to a wholly different use—one that might be both obnoxious and menacing to the adjoining owners? Where an absolute and unqualified fee-simple title is acquired by a railroad company it may of course, in the absence of express or implied restrictions, be conveyed to another." 71 Kan. at 542.

After stating this rule, the *Abercrombie* court noted:

"'But where there is an implied restriction, as is often the case in regard to the right of way, or the like, of a railroad company, the grant does not ordinarily vest a fee in the company, but vests such an estate, usually an easement, as is requisite to effect the purpose for which the property is required. Where the grant is of "surplus real estate," as it is often called, that is of real estate not forming part of the railroad or its appendages, a deed effective to vest a fee in a natural person will vest that estate in a railroad company.' (2 Ell. Rail. § 400.)

"The fact that the deed contains covenants of warranty, or that the right acquired is designated as a fee, is not necessarily controlling." 71 Kan. at 542-43.

The *Abercrombie* court analyzed cases from several jurisdictions before concluding:

"Now, as we have seen, the deed and those things to which we may look in its interpretation plainly show that the strip was sold on the one part, and purchased on the other, as and for a right of way for a railroad. This use, being within the contemplation of the parties, is to be considered as an element in the contract, and limits the interest that the railroad acquired. It took the strip for a specific purpose, and could hold it so long as it was devoted to that purpose. Whether the right of way purchased should be designated as an easement or as a qualified or determinable fee, may not be very important. A right of way, although commonly designated as an easement, is an interest in land of a special and exclusive nature, and of a high character. . . .

. . . .

"Whatever its name, the interest was taken for use as a right of way, it was limited to that use, and must revert when the use is abandoned.

> "We are not called upon to decide, nor do we intend to express an opinion, as to the rule applicable where lands are purchased or obtained without regard to the use to be made of them, or where there is nothing in the contract or conveyance indicating that they have been purchased for a right of way. Lands may be acquired by donation or by voluntary grant for aid in the building of railroads, and railroad companies may doubtless acquire lands for various uses in connection with railroad business which could not be taken by virtue of eminent domain, and as to these different rules may apply. It is intended to confine the decision to cases where the contract or conveyance shows that it was sold and received for use as a right of way for a railroad." 71 Kan. at 546-47.

The court concluded that Abercrombie acquired no interest in the land conveyed to him by the railroad and that upon abandonment of the right-of-way use, the property reverted to the original owners and their successors in interest. 71 Kan. at 547.

Danielson v. Woestemeyer*, 131 Kan. 796, 293 P. 507 (1930)*

The *Danielson* court considered an ejectment action where the abutting landowners on the north side of an abandoned railroad right-of-way sought to recover from the defendants a 200-foot-wide tract of land which had been conveyed to the railroad by a single deed describing the land in two 100-foot-wide strips. The boundaries of the southern 100-foot strip were described as being a right-of-way and being 50 feet equidistant from the center of the main railroad track, but no mention of the purpose of the northern strip of land was described in the deed. The plaintiffs insisted that the entire 200-foot strip was a right-of-way, but the evidence showed that the northern strip was used for other railroad purposes, as it contained a section house used by the railroad foreman or renters, a well, and a highway which was often used to reach the depot on the southern strip. On appeal the court held:

> "Where the owners of land claiming to be abutting owners on an abandoned railroad right of way whose land is separated from the real right of way or right of way proper by a strip of land to which the railroad company acquired the fee title and used it

> for railroad purposes other than right of way and later conveyed the same before discontinuing operations, such separation is held to deprive the first-mentioned owners of their claim or right as abutting owners in and to the right of way proper, and also in and to the intervening strip." 131 Kan. 796, Syl. ¶ 3.

The *Danielson* court distanced itself from *Abercrombie* and *Barker v. Lashbrook*, 128 Kan. 595, 279 P. 12 (1929), because the land in those cases was only 100 feet wide and the parties did not question whether the strip of land involved was a right-of-way. *Danielson*, 131 Kan. at 800-01. The court concluded that no doubt existed that the parties to the deed intended the southern strip to be the only part conveyed for a right-of-way and the northern strip was not for a right-of-way but was for other railroad purposes, and "[n]either can there be any question about the instrument conveying a fee title to all of it subject, of course, to the usual rule as to right of way being only an easement regardless of the language of the deed." 131 Kan. at 803-04. Applying the usual rules of construction to the deed, the court concluded that the southern strip was conveyed as a right-of-way and the northern strip was conveyed for fee purposes very much the same as was done in *Bowers v. Atchison, T. & S.F. Rly. Co.*, 119 Kan. 202, 237 P. 913 (1925). *Danielson*, 131 Kan. at 804.

Nott v. Beightel, *155 Kan. 94, 122 P.2d 747 (1942)*

In *Nott*, two town lots were conveyed to the railroad in fee title by warranty deed without any reversion clause and without mentioning the use of the property. The lots had been used for right-of-way purposes, but the railroad had since removed its tracks from the lots. An ownership dispute arose when the railroad conveyed the land to the plaintiff—the lessee of a scale house on the land—by quitclaim deed and the original owners of the land claimed that the land had reverted to them upon abandonment. The district court ruled in favor of the plaintiff and found the railroad had a fee simple interest to convey.

The *Nott* court distinguished this case from *Abercrombie* because the land was purchased without regard to its use or being designated as a right-of-way. Noting it would be contrary to public policy for narrow strips of railroad right-of-way not to revert when the railroad purpose had been abandoned, *Nott* was distinguishable in that entire lots had been conveyed and only part of the lots were used for railroad purposes. The court noted the general rule: "Where land is conveyed to the railroad company in fee without qualification, its title thereto is not lost by [nonuse] or abandonment,'" and cited a California case applying this rule. 155 Kan. at 97. In concluding that the trial court correctly quieted the plaintiff's title, the court quoted the above block-quoted language from syllabus paragraph 3 of *Danielson*. *Nott*, 155 Kan. at 98.

Harvest Queen Mill & Elevator Co. v. Sanders, *189 Kan. 536, 370 P.2d 419 (1962)*

Harvest Queen is quite similar to *Abercrombie* but with an added express use restriction, not a use implied in the language of the deed. In *Harvest Queen*, the railroad and its oil and gas lessees (plaintiffs) sought to quiet title to a narrow strip of land, including the underlying minerals, running across the defendants' farm. The defendants cross-petitioned to quiet title to the entire section of land containing the strips, conceding that a right-of-way easement existed. The original deed granted the railroad a strip of land 150 feet wide (75 feet from the center of the surveyed railway line) to be used "'for the purpose of building or constructing its roadbed or railroad and of completing and trimming its cuts and fills and for all other purposes for the building constructing or maintaining its roadbed or of maintaining its railroad.'" 189 Kan. at 538. The trial court ruled that the deed clearly conveyed only an easement for railroad right-of-way purposes, that plaintiffs were not the owners of the minerals on the land, and that title should be quieted in the defendants' favor. After discussing *Abercrombie* and the long-established caselaw, our Supreme Court affirmed the trial court. *Harvest Queen*, 189 Kan. at 540-44.

Schoenberger v. Missouri Pacific RR Co., *29 Kan. App. 2d 245, 26 P.3d 700 (2000), rev. denied 270 Kan. 899 (2001)*

Sharron relies on *Schoenberger* where an 1887 order condemned a strip of land for a railroad track right-of-way. One month later, an individual conveyed most of a quarter section of land to Memphis & Denver Town Company with mineral rights. Several months later, the company conveyed by warranty deed (1887 deed) a 500-foot wide strip of land to the railroad and then subsequently conveyed by warranty deed (1888 deed) several other town lots to the railroad. The railroad executed an oil and gas lease to Schoenberger, and the ownership of the land on which an oil well was situated came into issue. The trial court ruled that the preceding deeds conveyed only an easement and declared the prior leases void.

The *Schoenberger* court disagreed with the trial court, acknowledged that Kansas cases reach differing results, and noted that *Nott* and *Danielson* held a fee title is conveyed where the warranty deeds are void of any use limitations. The court found the 1887 deed did not contain a reversion clause and the 1888 deed did not contain any expressed use restriction. The court held that despite the small size of the land conveyed in the deeds—a 500-foot-wide strip of land—the lack of any express or implied use restriction required the court to conclude that both deeds conveyed fee title. 29 Kan. App. 2d at 247.

Stone v. U.S.D. No. 222, *278 Kan. 166, 91 P.3d 1194 (2004)*

In 2004, the Kansas Supreme Court synthesized many of the above cases in *Stone*. *Stone* involved an 1883 warranty deed to the Chicago Iowa and Kansas Railroad Company. The deed had various fee simple granting language in it and the property was described as follows:

"'Commencing at a point twenty (20) rods north of the South East corner of the North East quarter of Section two (2) in Town 3 S of R 3 E in Washington County State of Kansas Thence West 235 feet Thence North 15 rods thence east 235 feet Thence South 15 rods to the place of beginning.'" 278 Kan. at 168.

Outside of the railroad being a party to the deed transaction, there was no language in the deed concerning use or restrictions of the property. It was this factor that ultimately caused the Supreme Court to overrule the trial court and the Court of Appeals. 278 Kan. at 179-82. The *Stone* court found the deed was unambiguous and it was unnecessary to go beyond the four corners of the deed to examine parol evidence. 278 Kan. at 180. Both the Court of Appeals and Supreme Court performed an extensive discussion of the many cases cited above. The Supreme Court ultimately held:

"In this case, the unambiguous language of the original conveyance for a section of land which was 330′ x 235′ x 247 .5′ x 235′ does not suggest that it is to be used as a right-of-way. Only by using parol evidence, i.e., the subsequent deeds referring to a right-of-way, is it possible to determine that a portion of land originally conveyed was going to be used as a right-of-way. As no ambiguity existed in the original deed; the trial court and the Court of Appeals in this case should not have looked to this extrinsic evidence in concluding that the subject property was used for right-of-way and other railroad purposes.

"The general rule is that deeds purporting to convey to railroads a strip, piece, parcel, or tract of land which do not describe or refer to its use or purpose or directly or indirectly limit the estate conveyed are generally construed as passing an estate in fee. Annot., 6 A.L.R.3d 973, 979. The cases discussed above essentially follow this general rule.

"In *Abercrombie*, *Harvest Queen*, and *Humberg* [9 Kan. App. 2d 205], all of the deeds referred to the land being used as a right-of-way or for some other railroad purpose, and all of the cases found that the land had been conveyed as an easement. In contrast, *Danielson*, *Nott*, and *Schoenberger* all found that property which was conveyed by deed that did not limit the use of the land to right-of-way purposes had been conveyed in fee simple. This was true despite the fact that the land in *Nott* and *Danielson* was used for

railroad purposes, and the land in *Danielson* and *Schoenberger* was, in both cases, small in size. Although the size of the land described may help the court determine whether a right-of-way was intended in construing an ambiguous deed, the small size of the land is clearly not determinative of the issue.

"After reviewing this case law, we believe this case is most analogous to *Nott*. In both cases, relatively large portions of land were conveyed to the railroad, the deed was void of any use restrictions, and portions of the land were used for right-of-ways which were subsequently abandoned. In *Nott*, the fact that portions of the land were used for right-of-way and railroad purposes did not prevent the court from finding that entire tracts were held in fee simple. In this case, the only distinction is that a portion of the original conveyance was subsequently sold by the railroad, leaving a smaller piece of property when the right-of-way was abandoned. We do not believe that this subsequent conveyance changed the fee title held in the subject land." *Stone*, 278 Kan. at 180-81.

Biery v. United States, *753 F.3d 1279 (Fed. Cir. 2014)*

Here, Sharron cites a recent application of *Stone* by a federal court. *Biery* involved the donation of property by the Burlington Northern and Santa Fe [BNSF] railroad for a recreational trail pursuant to the National Trail Systems Act. The plaintiffs challenged whether BNSF, and its predecessor, had fee title from various deeds from the late 19th and early 20th century. Sharron addresses only the Chalfant/Fair deed in *Biery*, one of the three deeds that were addressed in the case. Through condemnation proceedings in 1889, BNSF's predecessor took an undisputed easement over land owned by Thomas Fair with no mention in the condemnation decree of his wife Julia. Later in 1899, after Thomas had died, Julia executed a quitclaim deed for the same property to BNSF's predecessor in exchange for $3,500. The property interest was:

"'A strip of land one hundred <100> feet wide being fifty <50> feet on each side of the center line of the railroad of the Hutchinson & Southern Railway as the same is now located and constructed over and across section thirty five <35> township twenty

> three <23> range six <6> with the appurtenances and all the estate, title and interest of the said parties of the first part therein.'" 753 F.3d at 1284.

The *Biery* court found Julia transferred fee simple title to the property when she quitclaim deeded the property to BNSF's predecessor. The court found Julia's deed transferred fee simple title because the words of the deed were unambiguous and there was no language in the deed indicating the parties intended to limit the railroad's interest to a right-of-way. The language of the deed conveyed "all the estate, title, and interest'" of Julia. 753 F.3d at 1288 (citing *Stone*, 278 Kan. at 179-82]. Sharron also quotes the *Biery* court decision for language that she argues is applicable here:

> "We are not persuaded by Chalfant's argument regarding the words 'over and across.' Those words reflect the simple truth that the railroad tracks run over and across the land that Ms. Fair transferred; they do not place a limitation on the transfer itself. Further, the fact that the railroad paid $3,500 for the land indicates that, contrary to Chalfant's suggestion, the railroad received more than just confirmation of an easement." 753 F.3d at 1288.

Here, defendant Crosby cites *Biery* for a different deed (the Phillips deed) addressed by the *Biery* court. The Phillips deed conveyed an interest in two tracts of land. The deed described the first tract in relation to the centerline of the railway and as "'the tract on which condemnation proceedings were filed.'" 753 F. 3d at 1288. The deed described the second tract in terms of two city lots without any reference to the railroad or the railway. The deed was titled "'Right of Way Deed'" and contained preprinted language that the estate was granted as "'an absolute and indefeasible estate of inheritance, in fee simple.'" 753 F. 3d at 1288. However, the word "warranty" appeared to have been written over the words "'Right of Way.'" 753 F.3d at 1288. The *Biery* court held that the Phillips deed granted an easement to the railroad over the first tract of described land—citing *Harvest Queen* and *Abercrombie*—and granted the railroad fee simple title to the second tract—citing *Stone*. *Biery*, 753 F. 3d at 1288-89.

Application and Analysis

With this abundance of Kansas jurisprudence, we now consider the original deed to Chicago Pacific in the present case. We are guided by several principles in this regard. To determine whether a railroad took property as a right-of-way, Kansas courts first look to the deed itself. *Stone*, 278 Kan. at 179-80. Is the deed at issue ambiguous? In making this determination, Kansas courts "apply the plain, general, and common meaning of the terms used in the instrument." *Central Natural Resources v. Davis Operating Co.*, 288 Kan. 234, 244, 201 P.3d 680 (2009) (citing *Johnson v. Johnson*, 7 Kan. App. 2d 538, 542, 645 P.2d 911, *rev. denied* 231 Kan. 800 [1982]).

Sharron argues the deed in the present case is unambiguous and embodied a fee simple conveyance. She argues *Schoenberger* and *Biery* found fee simple absolute conveyances under similar language and we should as well. Sharron argues that even if we find the language to be ambiguous in this case, the parol evidence still supports a finding of a fee simple conveyance. "An instrument is ambiguous when the application of pertinent rules of interpretation to the whole 'fails to make certain which one of two or more meanings is conveyed by the words employed by the parties.'" *Central Natural Resources*, 288 Kan. at 245 (quoting *Wood v. Hatcher*, 199 Kan. 238, 424, 428 P.2d 799 [1967]). If the language of a deed is ambiguous, we may consider facts surrounding the deed's execution in order to clarify the parties' intent. *Center Natural Resources*, 288 Kan. 245. For example, the size of the land may help in determining whether a right-of-way was intended in an ambiguous deed. *Stone*, 278 Kan. at 181.

Analyzing all the cases, we find *Abercrombie* to be the best application to the present facts. In both cases, it is undisputed there is no restrictive use language in the deed and also no reversionary language upon abandonment. However, it is also undisputed that the subject property was going to be or was actually used as a railroad.

The key language in *Abercrombie* was the court's statement of what type of facts the court was *not* called upon to decide in the case:

> "We are not called upon to decide, nor do we intend to express an opinion, as to the rule applicable where lands are purchased or obtained without regard to the use to be made of them, or where there is nothing in the contract or conveyance indicating that they have been purchased for a right of way." 71 Kan. at 546.

We agree with the *Abercrombie* court that land used for railroad right-of-ways are mere easements, regardless of the language use in the deed. We acknowledge the fee simple language in Chicago Pacific's deed and Sharron's demand that this language is conclusory. However, we do not find, as directed by *Abercrombie*, that language to be unilaterally controlling. See 71 Kan. at 543 ("The fact that the deed contains covenants of warranty, or that the right acquired is designated as a fee, is not necessarily controlling.").

Extrinsic evidence favors all of the defendants in this case as well. Under similar deed language, the *Ambercrombie* court looked at extrinsic evidence in construing the deed, which in our case would clearly demonstrate the subject property was intended to be used as a railroad right-of-way.

As was the case in *Ambercrombie*, there is an obviously recognizable implied use of the property. The language of the Chicago Pacific deed clearly indicates an implied use or implied restriction for the purpose of a railroad. The description of the property is designated in terms of it being "'one hundred and seventy five feet each side of the center line'" of the Chicago Pacific's Railroad route as it was surveyed, staked, and located. Additionally, deeds further down the line also recognized the right-of-way nature of the Chicago Pacific's interest. The deed from Dirt and Gravel Inc., to the Jenkins described the property as "'[a]ll that portion of the abandoned Chicago, Rock Island and Pacific Railroad right of way'" in various lots located in Holton.

We pause to comment on specific cases relied upon by Sharron. First, she argues this case is quite similar to *Nott* and we should similarly find Chicago Pacific obtained fee simple title to the property. *Nott* involved the purchase of land without any express or implied use language in the deed and involved town lots and the fact that "entire lots were conveyed." 155 Kan. at 97. This was the case in *Stone* as well where the deed did not describe the property in terms of the railroad and, absent the railroad being a party to the deed transaction, there was no language in the deed concerning use or restrictions of the property. *Nott* and *Stone* are not persuasive.

We also find *Biery* and *Schoenberger* not applicable. *Biery* is distinguishable based on the fundamental principle in real estate law that one cannot transfer an interest in property that one does not hold. See, *e.g.*, *Shiels v. Wright*, 51 Kan. App. 2d 814, 817 357 P.3d 294 (2015) (in a transfer-on-death situation, "[s]ince Richard conveyed all of the property away during Richard's lifetime, there was nothing to transfer on his death via the transfer-on-death deed."). Concerning the Chalfant/Fair deed in *Biery*, Julia's husband had already given the railroad an undisputed easement over the subject property. While the property description is quite similar to the deed in the present case, at the time Julia executed a quitclaim deed, she had no easement to transfer, she only had a fee simple estate left to transfer. 753 F.3d at 1288. In light of Julia's fee simple interest and the fact that she gave the railroad the property "'with the appurtenances and all the estate, title and interest,'" 753 F. 3d at 1287, we are comfortable that our decision is in line with *Biery* as well. The court in *Schoenberger* relied heavily on the fact that the deeds contained no reversionary clause or express use restrictions. However, the court specifically found that the deed in that case lacked "any express or *implied use* restriction." [Emphasis added.] 29 Kan. App. 2d at 247. In her appellate brief, Sharron argues *Schoenberger* considered "a deed containing nearly identical language to the deed in this case." This is misleading. The full language of the deed is not included in the *Schoenberger* opinion and the

language in the Chicago Pacific deed indicates a clear implied railroad use as detailed above.

A couple of final points. Sharron argues the landowners transferred property in the form of a strip of land 350 feet wide and this amount was far in excess needed for laying railroad tracks. See K.S.A. 66-501 ("To lay out its road, not exceeding one hundred feet in width.). The court in *Schoenberger* recognized that a 500-foot-wide strip of land was a relatively "small size of land conveyed" and the present case involves a 350-foot-wide strip of land—150 feet shorter in width than *Schoenberger*. 29 Kan. App. 2d at 247. The present case also does not involve town lots as addressed in *Nott* and *Schoenberger*. The present case does not involve "surplus real estate" not involved with the railroad. See *Abercrombie*, 71 Kan. at 542-43. Last, Sharron states that Chicago Pacific paid $5,750 for the land in 1886 and this is strong evidence of a purchase of land in fee simple, not a price more reflective of a railroad easement. As pointed out by the defendants, Sharron does not provide any comparative analysis or evidence of whether the price Chicago Pacific paid for the property was high or low regarding property values at the time. The defendants also state Sharron failed to raise this issue below as well. See *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009) (Issues not raised before the trial court cannot be raised on appeal.).

The *Abercrombie* court stated that it intended to confine its decision "to cases where the contract or conveyance shows that it was sold and received for use as a right of way for a railroad." 71 Kan. at 546. The present case is just such a case. The district court did not err in finding that Chicago Pacific's interest in the property subject to this appeal was a railroad right-of-way easement and reverted to the original landholdings as provided in the district court's memorandum decision.

Affirmed.