STATE OF MICHIGAN

COURT OF APPEALS

PETER J. MOUSSEAU, COLLEEN A. WALKER, CARL SCHMIDT, MILDRED SCHMIDT, MARTIN SMITH, MARY SMITH, CONSTANTINE SOUSANIS, ANNE SOUSANIS, DOUGLAS J. DAVIDSON, RICHARD W. DAVIDSON, VERN STOLDT, THOMAS STOLDT, and JOSEPHINE KOVACS TRUST,

Plaintiffs-Appellants,

v

GRAND TRUNK WESTERN RAILROAD COMPANY,

Defendant-Appellee.

UNPUBLISHED
September 13, 1996

No. 176206
LC No. 91-016559

Before: MacKenzie, P.J., and Saad and C.F. Youngblood*, JJ.

PER CURIAM.

This case was begun in 1991 pursuant to MCL 469.221; MSA 22.591[1], governing the abandonment of subsidized railroads. Plaintiffs appeal as of right from an order granting summary disposition in favor of defendant. We affirm.

The facts are not in dispute. In the 1880s, defendant's predecessor acquired land from plaintiffs' predecessors in interest so that the Pontiac Oxford railroad track could be constructed on the land. The Pontiac Oxford track was constructed, at least in part, by public aid and local subscription. The track has been abandoned since 1986. Plaintiffs brought this action based on MCL 469.221; MSA 22.591, which provided in part:

> It shall be unlawful for any railroad company…whose road has been constructed wholly or in part by public aid or local subscription…to…abandon…said track…except upon the decree or order of the circuit court…upon petition of the

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* Circuit judge, sitting on the Court of Appeals by assignment.

> railroad company…desiring to make such abandonment…*Provided, That…such railroad company first deed back to the person, persons, or corporation from whom it was received, or to his or its heirs, assigns, executors, administrators, or successors, each and every tract, part or parcel of land, or right of way, obtained from such person, persons or corporation.* [Emphasis added.]

Plaintiffs contended that the statute required defendant to deed the land back to them. The trial court disagreed, ruling that under *Quinn v Pere Marquette Railway Co,* 256 Mich 143; 239 NW 376 (1931), the deed back provision of the statute applies only to land donated to the railroad, and not to land acquired by purchase. Because the land in this case was purchased by defendants' predecessor, and because plaintiffs' predecessors conveyed a fee simple interest in the property, the court concluded that plaintiffs had no interest in the land. Accordingly, the court granted summary disposition in favor of defendant.

On appeal, plaintiffs first claim that the trial court erred in concluding that *Quinn, supra,* is binding precedent. The claim is without merit. See *O'Dess v Grand Trunk Western Railroad Co,* ___Mich App ___; ___ NW2d ___ (Docket No. 168827, issued). Under *Quinn,* the deed back provision of MCL 469.221; MSA 22.591 does not apply to property acquired by purchase. Instead, "[w]here the property is taken by purchase, the character of the [railroad's] estate is determined by the terms of grant, as in other cases." *Quinn, supra,* p 151. The trial court did not err in applying *Quinn.*

Plaintiffs argue that, even if *Quinn* is binding, they are still entitled to ownership of the land because the terms of their predecessors' deeds conveyed an easement to defendant's predecessor rather than a fee simple absolute. Plaintiffs did not raise this issue before the trial court; in fact, their position in the trial court was that the nature of the interest conveyed through the deeds was not relevant. As a general rule, this Court declines to consider an issue raised for the first time on appeal, *Eastway & Blevins Agency v Citizens Ins Co of America,* 206 Mich App 299, 303; 520 NW2d 640 (1994), unless failure to do so would result in manifest injustice, *Achtenberg v East Lansing,* 421 Mich 765, 773; 364 NW2d 277 (1985). In this case, it would not. As noted by the special master in *O'Dess v Grand Trunk Western RR Co,* Oakland County Circuit Court case no. 91-409012-CH, whose opinion was adopted by the trial court in this case, the words of conveyance used in the deeds, the description of the interests conveyed, and the words of limitation employed, along with the holdings of *Quinn, supra,* and *Epworth Assembly v Ludington & Northern Railway,* 236 Mich 565; 211 NW 99 (1926), all support the conclusion that the deeds unambiguously granted a fee simple interest rather than an easement.

Affirmed.

/s/ Barbara B. MacKenzie
/s/ Henry William Saad
/s/ Carole F. Youngblood

[1] MCL 469.221; MSA 22.591 has since been repealed by 1993 PA 354, § 451, effective January 14, 1994. The repealer did not extinguish plaintiffs' cause of action, however. See *Minty v Bd of State Auditors*, 336 Mich 370; 58 NW2d 106 (1953).